Supreme Court, U.S.
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No. 1

In The
Supreme Court of the United States

ROBERT J. CAMPBELL,
Petitioner,

v.

TOWN OF WEYMOUTH, MA, et al.
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT J. CAMPBELL
Petitioner, pro se
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QUESTION(S) PRESENTED FOR REVIEW

Whether the Judgment of the United States Court of Appeals for the First Circuit is consistent with the decisions of the other Courts of Appeals on Fourteenth Amendment Due Process claims relying on the guidelines defined by the Supreme Court in Williamson County Commissioners v . Hamilton Bank, 473 U.S. 172 (1985); and,

Whether the Petitioner is required to pursue remedies in the state court on his Substantive and Procedural Due Process claims of deprivation of property rights before they can be decided in Federal Court; and,

Whether the Judgment of the First Circuit Court of Appeals, affirming dismissal of the Petitioner's civil rights claims with prejudice, is consistent with its own decisions pertaining to the sufficiency of the Petitioner's [pro se] Complaint and Supplemental Pleadings; and,

Whether the Respondents violated the Petitioner's rights to Free Speech given by the Petition Clause of the First Amendment by amending local zoning bylaws in retaliation for his appeal to the Massachusetts Land Court on the denial of his Special Permit application; and,

Whether the amended zoning bylaws are unconstitutional as applied, in violation of the Equal Protection Clause of the Fourteenth Amendment, by depriving the Petitioner and an entire class of citizens of a vested right given to daycare centers

[and daycare developers] under Massachusetts General Laws (M.G.L). c40A, §3; and,

Whether the Petitioner should be allowed to amend his federal complaint to include claims under the Free Speech and Petition Clauses of the First Amendment and Equal Protection Clause of the Fourteenth Amendment.

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject to this petition is as follows:

— PETITIONER:
ROBERT J. CAMPBELL, Plaintiff-Appellant, pro se
THE CAMPBELL FAMILY INVESTMENT TRUST, Plaintiff

— RESPONDENT(S):
Defendants-Appellees:
TOWN OF WEYMOUTH, MA
PAUL M. DILLON, individually and as member of the Weymouth Planning Board;
MARY SUE RYAN, individually and as member of the Weymouth Planning Board;
SUSAN ABBOTT, individually and as member of the Weymouth Planning Board;
PAUL F. LYNCH, individually and as member of the Weymouth Planning Board;
JAMES CLARKE, individually and as Director of Planning and Community Development;
JEFFREY R. COATES, individually and as Director of Liens and Licenses; and
MARY S. MCELROY, individually and as member of the Weymouth Board of Zoning Appeals;
FRANCIS O'BRIEN, individually and as member of the Weymouth Board of Zoning Appeals;
EDWARD FOLEY, individually and as member of the Weymouth Board of Zoning Appeals;
MARTIN JOYCE, individually and as member of the Weymouth Board of Zoning Appeals;

MICHAEL NASUTI, Officer, individually and as a member of the Weymouth Police Department; and
SANDRA GILDEA, individually; and
RUTH S. AMOS, individually; and
WILLIAM RYAN, individually and as a member of the Weymouth Board of Selectmen

STANLEY ELKERTON, Defendant

TABLE OF CONTENTS

Page

1. OPINIONS BELOW..... 1

2. JURISDICTION..... 2

3. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

4. STATEMENT OF THE CASE..... 2

5. REASONS FOR GRANTING THE WRIT... 11

6. CONCLUSION..... 30

INDEX TO APPENDICES

Page

APPENDIX A– United States Court of Appeals for the First Circuit, JUDGMENT affirming Dismissal of Petitioner's civil rights claims, dated 3/19/07 ..... App. 1

APPENDIX B– United States District Court, District of Massachusetts, ORDER OF DISMISSAL of civil rights claims with prejudice, dated 3/17/06 ..... App. 4

APPENDIX C– United States Court of Appeals for the First Circuit, ORDER OF COURT allowing motion for enlargement of time to file Petitions for Panel rehearing and Rehearing En Banc, dated 4/9/07 ..... App. 6

APPENDIX D– United States Court of Appeals for the First Circuit, ORDER OF COURT denying Petitions for Panel rehearing and Rehearing En Banc, dated 6/11/07 ..... App. 8

APPENDIX E– United States District Court, District of Massachusetts, TRANSCRIPT of Motions Hearing, dated 3/16/06 ..... App. 10

APPENDIX F– Text of APPLICABLE CONSTITUTIONAL PROVISIONS, CODES, STATUTES, AND BYLAWS ..... App. 20

APPENDIX G– Massachusetts Land Court, Miscellaneous Case No. 237269, Campbell v. Town of Weymouth, DECISION ON CROSS MOTIONS FOR SUMMARY JUDGMENT AND ORDER OF REMAND, dated 9/23/98 .... App. 34

APPENDIX H– United States Court of Appeals for the First Circuit, ORDER OF COURT denying Motion to Stay Mandate, dated October 10, 2007 ..... App. 45

APPENDIX I– United States District Court, District of Massachusetts, Case No. 05-10620-WGY, Campbell v. Town of Weymouth, et al. FURTHER MEMORANDUM AND ORDER, Entered June 27, 2005 ..... App. 47
APPENDIX J– United States District Court, District of Massachusetts, Case No. 05-10620-WGY, Campbell v. Town of Weymouth, et al. MEMORANDUM AND ORDER, Entered August 19, 2005 ..... App. 69
APPENDIX K– United States District Court, District of Massachusetts, Case No. 05-10620-WGY, Campbell v. Town of Weymouth, et al. FURTHER MEMORANDUM AND ORDER, Entered October 14, ... App. 78

TAI OF AUTHORITIES CITED

Page

Agins v. City of Tiburon, 447 U.S. 225 (1980) 14

Amaker v. Weiner, 179 F.3d 48, 52 (2d Cir. 1999) 25

Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977) 25, 26, 27

Batchelder v. Allied Stores Corp., 393 Mass. 819, 821 (1985) 21

Beddall v. State St. Bank & Trust Co., 137 F.3d 12, 17 (1st Cir. 1998) 27, 28, 29

Bible Speaks v. Town of Lenox, 8 Mass. App. Ct 19, 31 (1979) 16

Blackstone Realty LLC v. FDIC, 244 F.3d 193, 197 (1st Cir. 2001) 28

Boateng v. Interamerican Univ., 210 F.3d 56, 60 (1st Cir. 2000) 28, 29

Brad Cartwright v. Town of Braintree, Land Court Misc. Case No. 236228 16

Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994) 29

Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994) 24, 27

Campbell v. Weymouth, Massachusetts Land Court Docket #237269 (1998) 16

Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99(1957) 23

County Commrs. of Bryan County v. Brown, 520 U.S. 397, 403-404 (1997) 21, 22

TABLE OF AUTHORITIES CITED (CONTINUED)

Page

Cruz v. Melecio, 204 F.3d 14, 21 (1st Cir. 2000) 27

D'Amico v. California, 389 U.S. 416 (1967) 22

Data Processing Service v. Camp, 397 U.S. 150, 154 26

Davis v. Schnell, 81 F. Supp. 872 (SD Ala.), aff'd per curiam, 336 U.S. 933 (1949) 27

Euclid v. Amber Realty Co. 272 U.S. 365 (1926) 26

Fudge v. Penthouse Int'l, Ltd., 840 F.2d 1012, 1015 (1st Cir. 1988) 29

Griffin v. School Board, 377 U.S. 218 (1964) 27

Haines v. Kerner, 404 U.S. 519, 520, 30 L. Ed. 2d 652, 92 S.Ct. 594, 596 (1972) 24

Henson v. CSC Credit Servs., 29 F.3d 280, 284 (7th Cir. 1994) 28

Howcroft v.City Of Peabody, Mass. App. Case No. 98-P-2151 (2001) 20, 21

Hudson v. Palmer, 468 U.S. 517 (1984) 19, 20

Hughes v. Rowe, 449 U.S. 5, 10, 101 S. Ct. 173, 174, 66 L. Ed. 2d 163 (1980) 24

In re Colonial Mortg. Bankers Corp., 324 F.3d 12,15-16 (2003) 28

Jacobs, Visconsi & Jacobs v. City of Lawrence, 927F. 2d 1111, 1115 (10th Cir. 1991) 18

Keyes v. School Dist. No. 1, Denver Colo., supra, at 207 27

LaChapelle v. Berkshire Life Ins. Co., 142 F.3d 507, 509 (1st Cir. 1998)..... 28

TABLE OF AUTHORITIES CITED (CONTINUED)

Page

Lane v. Wilson, 307 U.S. 268 (1939) 27

Laubinger v. Department of Rev., 41 Mass. App. Ct. 598, 602 (1996) 21

Lovelace v. Software Spectrum Inc., 78 F.3d 1015, 1017-18 (5th Cir. 1996) 27

Maher v. Durango Metals, Inc., 144 F.3d 1302, 1304 (10th Cir. 1998) 23

McNeese v. Board of Education, 373 U.S. 668 22

Monahan v. Methuen, 408 Mass. 381, at 392 (1990) 20

Monell v. Department of Social Servs. of New York, 436 U.S. 658, 688, 694 (1978) 21, 22

Monroe v. Pape, 365 U.S. 167, 180-183 22

Nectow v. City Of Cambridge, 277 U.S. 183 (1928) 14, 26

O'Malley v. Sheriff of Worcester County, 415 Mass. 132, 141 n.13 (1993) 21

Ordinance 59 Ass'n v. United States DOI Secy., 163 F.3d 1150, 1152 (10th Cir. 1998) 23

Parrat v Taylor, 451 U.S. 527 (1981) 19

Pearson v. City of Grand Blanc, 961 F. 2d 1211,1215-16 (6th Cir. 1992) 18

Penn Central Transp. Co v New York City, 438 U.S. 104, 138 (1978) 14

Petrucci v. Board of Appeals of Westwood, Mass. Land Court Misc. Case No. 219424) 15

TABLE OF AUTHORITIES CITED (CONTINUED)

Page

Posr v. Court Officer Shield No. 207, 180 F.3d at 419 25

Ruiz v. McDonnell, 299 F.3d 1173, 1181(10th Cir. 2002)..... 24

S. Pac. Transp. Co. v. City of Los Angeles, 922 F. 2d 498.....19

Sierra Club v. Morton 405 U.S. 727, 734 (1972) 26

Sisters of the Holy Cross v. Brookline, 347 Mass. App. Ct. 486, 494 (1964) 16

Summum v. City of Ogden, 297 F.3d 995, 1000 (10th Cir. 2002) 25

Swanset Dev. Corp. v. Taunton, 423 Mass. 390, 391 (1996) 21

Trustees of Tufts College v. Medford, 33 Mass. App. 580, 602 N.E.2d 1105 (1992) 16

United States v. Salerno, 481 U.S. 739, 746 18

United States v. SCRAP, supra, at 686-687 26

Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). 26

Watterson v. Page, 987 F.2d 1 3-4 (1st Cir. 1993).... 28

Weixel v. Bd. of Educ., 287 F.3d 138, 146 (2d Cir. 2002) 24, 27

Williamson County Commissioners v. Hamilton Bank, 473 U.S. 172 (1985) 13, 18, 19

James Wm. Moore et al., Moore's Federal Practice 12.34 [2] (3d Ed.1997) 29

OPINIONS BELOW

United States Court Of Appeals
For The First Circuit, Case No. 06-1794,
Campbell v. Town of Weymouth, et al.:
MANDATE, Entered June 27, 2007
ORDER OF COURT, Denying Petitions for Panel Rehearing and Rehearing En Banc, Entered June 11, 2007
JUDGMENT, Entered March 19, 2007
ORDER OF COURT, Denying Motion to Stay Mandate, Entered October 10, 2007

United States District Court,
District of Massachusetts, Case No. 05-10620-WGY,
Campbell v. Town of Weymouth, et al.
ORDER OF DISMISSAL, Entered March 17, 2006
TRANSCRIPT OFMOTION HEARING, Held on March 16, 2006
FURTHER MEMORANDUM AND ORDER, Entered October 14, 2005
MEMORANDUM AND ORDER, Entered August 19, 2005
MEMORANDUM AND ORDER, Entered June 27, 2005

Commonwealth of Massachusetts Land Court,
Miscellaneous Case No. 237269,
Campbell v. Town of Weymouth, et al.
DECISION ON CROSS-MOTION FOR SUMMARY JUDGMENT AND ORDER OF REMAND, Entered September 23, 1998

JURISDICTION

This Honorable Court is authorized to review this Petition for Writ of Certiorari by Title 28 of the United States Code ("U.S.C."), Section 1254 (1).

The United States Court of Appeals for the First Circuit ("1st Cir. Ct. Appeals") had jurisdiction over this matter under 28 U.S.C. §1291.

The United States District Court, District of Massachusetts ("DC") had original jurisdiction over this matter pursuant to 28 U.S.C. §1331, 28 U.S.C. §1343, 28 U.S.C. §1441(c) and 42 U.S.C. §1988(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves The Free Speech and Petition Clauses of the First Amendment, the Due Process, Just Compensation and Equal Protection Clauses of the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States.

The petitioner has complained that the respondents' actions violated specific sections of the United States Code ("U.S.C.") under Title 42 U.S.C. §§ 1983, 1985 and 1986, resulting from violations of a variety of Massachusetts General Laws ("M.G.L.").

STATEMENT OF THE CASE

For the following discussion, the Respondents Paul Dillon, Mary Sue Ryan, Susan Abbott, Paul Lynch, and Mary McElroy, will be collectively referred to as

["the Planning Board"], James Clarke as ["Planning Director"], Jeffrey Coates as ["Building Inspector"], Francis O'Brien, Edward Foley, and Martin Joyce collectively, as the Board of Zoning Appeals ["BZA"][1]. The remaining Respondents will be referred to as follows: Michael Nasuti ["Nasuti"] William Ryan ["Wm. Ryan"] to distinguish from Mary Sue Ryan, ["M.S. Ryan"], {All above collectively as "Town Respondents"}; Sandra Gildea ["Gildea"], and Ruth S. Amos ["Amos"].

In February 1996, the Petitioner sought building permits to construct a daycare center and primary residence on two (2) undeveloped lots in the Town of Weymouth ("Town"), Massachusetts. The Building Inspector refused to issue the permits since both lots were located in a single family residential district and within the 100 year floodplain, a FEMA designated flood hazard zone, and further advised that a Special Permit was required in order to build on the land.

Campbell filed applications for Special Permits for both lots and after two (2) Public Hearings in April and June 1996, the Planning Board ("PB") approved the special permit for the residential ("house") lot. In regards to the daycare center ("locus"), the plans prepared by Campbell's General Contractor contained substantial errors and were withdrawn

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[1] Respondent McElroy was also a member of the Board of Zoning Appeals when the Petitioner requested the variance in 2002, but was absent for the Public Hearing when the BZA voted on the Petitioner's 2002 special permit & variance applications.

after a Public Hearing in May 1996. The PB allowed the withdrawal without prejudice.

On or about November 1, 1996, Campbell submitted a second special permit application with completely revised plans for the daycare. In the interim, the PB had proposed changes to the Town's Zoning Bylaws to increase the minimum lot size, and added minimum off-street parking requirements for daycare centers.[2] The proposed zoning changes were submitted to the Warrant for Town Meeting in January, 1997, approved by vote at Town Meeting in May 1997, and effective August, 1997.

Four (4) Public Hearings were held on the special permit application between December 1996 and February 1997. In January, 1997, Campbell further revised his plans to comply with the proposed off-street parking requirements, but was not obligated to do so. Despite this concession, the PB voted to deny the special permit on February 24, 1997.

With representation, Campbell appealed the decision to the Massachusetts Land Court ("L.C.") (Docket #237269), in March 1997. During litigation on the Petitioner's appeal in L.C., the PB proposed further amendments to the zoning bylaws ("1998 Amendments"), specifically targeting daycare development; twice increasing the minimum number of parking spaces; and, limiting off-street parking requirements. The use of the twenty-foot (20')

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[2] The proposed zoning changes were the first appearance of requirements specifically applicable to daycare centers in Weymouth.

minimum front set-back in residential districts ("Zone R-1"), was also prohibited for non-residential uses (eg. parking or loading and unloading students at a commercial daycare). Campbell's revised plan included a semi-circular drive, wide enough for two (2) vehicles, specifically for transient parking to load & unload children off the street and sidewalk.

The 1998 Amendments were added to the Town Meeting Warrant in January 1998, four (4) months after the first bylaws became effective. The 1998 Amendments were approved by Town Meeting in May 1998, effective August 1998. In the same litigation period, the Board of Selectmen also acted to change the Town's commercial licensing procedures to require Criminal Offense Records Investigation ("CORI") checks from the applicant only, to include "its officers, stockholders and directors."

The L.C. decided in Campbell's favor in September 1998, and special permits were issued on remand in November 1998. Campbell was unable to proceed before the special permit was to expire in November 2000, due to financial problems caused by the Respondents' actions; the costly and lengthy appeal; three (3) mortgages on the lots; increased construction costs; and two (2) rescinded financing agreements. Prior to it's expiration, Campbell applied for a Building Permit and decided to sell the house lot to reduce the financial burdens.

Campbell claims that between September 2000 and May 2001, employees of the Building Department turned away prospective buyers by mistakenly

informing them that the house lot was "too small" to build on[3]. This misinformation and negligence delayed the sale of the land, and hence, Campbell's ability to proceed with construction. The special permit and building permit expired in May 2001, imposing the 1998 Amendments on any new applications.

Campbell requested an extension of the special permit due to the extraordinary circumstances, but was denied since the Special Permit had already expired. In December 2001, Campbell resubmitted the identical plans with a subsequent (third) application for special permit and requested a variance to the minimum parking requirements and non-residential use of the minimum front set-back. After a Public Hearing in February, 2002, the Board of Zoning Appeal's ("BZA") approved the special permit, but denied the variance. Campbell then filed a timely appeal, pro se, in the L.C. (Docket #280041).

Campbell's cause of action for his civil right rights complaint was realized during the Summer of 2004, when information obtained through Discovery in the L.C. proceedings produced clear and convincing evidence that the 1998 Amendments were made arbitrarily and capriciously, and by deceptive methods. Campbell then realized that this entire

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The minimum lot size to build in a single family residential zoning district was increased from 15,000 s.f. to 25,000 s.f. in the 1997 Zoning Amendments. Both of the Campbell's lots were approximately 15,000 s.f., but were exempt from the increase due to the grandfather clause of M.G.L. ch.40A, §6.

ordeal was deliberately and maliciously imposed on him.

Campbell attempted to remove the action from the state L.C., by filing an Original Complaint[4] ["Orig. Compl."] in the DC on March 14, 2005, pursuant to 28 U.S.C. §§1441(c) and 1654. Campbell then filed a First Amended Complaint ["1st Compl."] on May 24, 2005 with a Motion to Proceed informa pauperis ("IFP").The DC screened the 1st Comp. pursuant to 28 U.S.C. §1915, and issued a Memorandum and Order to Show Cause [1st Mem.& Ord., dtd 6/27/05].

On 8/1/05, Campbell filed a Response to Show Cause Order ["Cause Resp."] asserting the merits of his claims; standing to bring claims of property deprivation and violations of constitutional rights; federal jurisdiction; inadequacy of state law remedies; the appropriate time frame for tolling the statute of limitations; a revised Application for IFP status and the Second Amended Complaint ("2nd Compl."). No motion to file the 2nd Compl. was made.

The DC issued a Second Memorandum and Order [2nd Mem.& Ord., dtd 8/19/05] allowing the 2nd Compl. as the operative pleading, denied IFP status and ordered that the 2nd Compl. be filed and served on the Respondents, if the filing fee was paid. The DC also ordered that no further amendments to the 2nd Compl. are allowed, absent leave of the Court and

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The document header was titled "Original Complaint", but the Civil Cover Sheet, Form JS44, completed by the Plaintiff and filed with the Orig. Compl., indicated the case "Origin" (in Section V.) as "Removed from State Court" (Box 2 Checked).

upon a showing of good cause. An appearance filed on behalf of the co-plaintiff Campbell Family Trust ("Trust") also was stricken as contrary to the Fed R. Civ. P.. The Trust was dismissed from the action without prejudice, and was given 35 days to retain counsel. After failing to do so, the Trust was dismissed by the DC's Further Memorandum and Order [3rd Mem. & Ord., dtd 10/14/05, pg. 2].

In January and February 2006, the Defendants ("Respondents") were served with Summonses, 2nd Compl., 1st Mem.& Ord. and 2nd Mem.& Ord., as ordered by the 2nd Mem.& Ord. [pg.4, Sec.II]. In response, the Respondents filed three (3) Motions to Dismiss ("Town's Motion Dismiss"; Amos' Motion Dismiss"; and, "Gildea's Motion Dismiss") citing failure to state a claim; claims are time-barred; Campbell has no protected property/liberty interest in locus; adequate post-deprivation remedies exist under Massachusetts laws; the action was filed in DC to avoid Massachusetts' Anti-SLAPP statute, M.G.L. c.231 §59H; and, the conspiracy allegations do not satisfy the "notice pleading" requirements of Fed. R. Civ. P., Rule 8(a).

Campbell replied to each Motion to Dismiss with Opposition Statements ("Opp. to Town"; "Opp. to Amos"; and, ("Opp. To Gildea"). Campbell countered Amos' Motion Dismiss with Documents Affidavits ("L.C.-Docs. Aff.") previously filed in L.C. Docket #280041 and a Motion to Amend Complaint To Conform To The Evidence (in accordance with Fed. R. Civ. P., Rule 15(b)). Campbell did not include a proposed Amendment to the 2nd. Compl., but provided a response to the DC's Show Cause Order

[2nd Mem. & Ord., pg.5, Sec III] and a statement of seven (7) reasons in support of the Motion [Opp. to Amos., pg.11]. The DC did not act on the Petitioner's Motion to Amend Complaint and did not respond to Campbell's Statement of Reasons.

In response to the Town and Gildea, Campbell refuted their arguments, and provided Documents Affidavits supporting his claims with evidence of a municipal policy to defy M.G.L., arbitrary and capricious acts, intentional harassment and (Respondent's assented to) standing {from L.C. Decision on Docket #237269}.

Campbell further attempted to "...clarify the claims, cause and relevant facts through [the several] opposition statement[s] and in subsequent pleadings." [Opp. to Town, pg.3,¶3] There is no indication that the DC considered either the Petitioner's efforts to restate or clarify the claims in his Opposition Statements or the attached Documents Affidavits in ruling on the Motions to Dismiss.

Following the preliminary proceedings, a hearing was held on 3/16/06 on the Respondent's Motions to Dismiss ("Transcr."). At oral arguments, Campbell argued for equitable tolling on the statute of limitations, federal jurisdiction, inadequacy of state law remedies pertaining to inverse condemnation, individual, official, and municipal liability, and constitutional violations. The DC dismissed the Plaintiff's federal claims under §1985 without prejudice, and all other claims, including §§1983 and

1986 with prejudice [DC "Ord. to Dismiss", dtd 3/16/06].

Campbell filed his NOA on 4/7/06, seeking relief from the DC Order to Dismiss his civil rights claims under §1983. Between June 2006, and November 2006, Campbell filed a several administrative motions including, but not limited to, a Leave to Amend Caption, Leave to Amend [his Second Amended] Complaint (in the 1st Cir. Ct. Appeals) and Leave to Amend Notice Of Appeal (in the DC). The Amended Notice of Appeal sought relief from the DC Order to Dismiss his civil rights claims under §§1983 and 1986 and all other claims dismissed with prejudice. The 1st Cir. Ct. denied Campbell's Motion For Leave to Amend Complaint by Order of Court, entered 7/10/07.

After review, the 1st Cir. Ct. issued it's Judgment affirming the DC's Dismissal of the Petitioner's Complaint on March 19, 2007. Campbell moved for an Enlargement of Time to File Petitions for Rehearing and Rehearing En Banc on April 4, 2007. The Court granted the enlargement by it's Order dated 4/9/07, but denied the timely filed Petitions on June 11, 2007. The Court issued it's Mandate on June 27, 2007. Campbell filed a Motion to Stay Mandate on September 7, 2007, which was denied by Order entered October 10, 2007. This Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

The Petitioner has couched his civil rights claims as a deprivation of property rights in violation of the Due Process Clause of the Fourteenth ("14th") Amendment of the Constitution, on the basis that the Town Respondents' unlawful and unauthorized actions to amend local zoning bylaws in 1998 were arbitrary and capricious, and effected no legitimate governmental interest. Campbell claims the 1998 amendments were implemented through deceptive means, under the guise of reasonable regulation, directly contradicting the legislative intent of the zoning exemption given by M.G.L. c.40A, §3 ["Dover Amendment"].

The Town Respondents deliberately acted to defy the statute while the Petitioner pursued his appeal of the Special Permit denial. Campbell insists these actions were taken in retaliation for having sought the appeal, and provided an illegitimate basis to deny a future application (in the event the Town prevailed).

The Dover Amendment grants a vested right to daycare centers and their developers, which the Town sought to remove, by denying Campbell and other class members Equal Protection under the law. The individuals responsible for these actions are or were de facto policy makers for the municipality, is evident by their appointment to develop the zoning policies governing the redevelopment of the South Weymouth Naval Air Station ["NAS-South Weymouth"]; a former military facility that was closed in 1995 by the Base Re-alignment and Closure ["BRAC"] initiative. Evidence shows that the same

individuals incorporated an exemption to M.G.L. c40A, §3 in the Zoning Plan approved by the three (3) towns[5] in 1998.

The Petitioner also submitted evidence that the respondents sought to change the Dover Amendment, by way of a bill introduced to the Massachusetts Legislature in 1998, by [State] Senator Hedlund, (R-Weymouth). This effort underscores the Town's determination to avoid compliance with the Dover Amendment. An article in the New England Section of the Wall Street Journal attributed the subject daycare project as the impetus for the bill, naming both Campbell and his wife in the article.

If the Petitioner is forced by the Judgment of the 1st Cir. Ct, to pursue this action in state courts, the only relief available is a partial remedy. Municipal employees are immune from individual liability under the Massachusetts Tort Claims Act (M.G.L., c.258, §2) and the municipality itself is not considered a "person" under the Civil Rights Act (M.G.L., c.12.§§ 11H, 11I)["M.C.R.A."]. Even an Inverse Condemnation claim, compensable under M.G.L., c.79 §10, carries an insufficient remedy by limiting the amount of compensation to the value of the property. Without invalidation, the primary obstacle to the Petitioner's project remains in place.

NAS-South Weymouth geographically resides in the Towns of Weymouth, Abington and Rockland, each of which voted to approve the Zoning and Land-Use By-Laws for NAS-South Weymouth, before the draft plan was submitted to the United States Navy.

The Petitioner further insists that there is a substantial need for this Honorable Court's intervention to resolve grave disparities in how the question is interpreted by the various Courts of Appeals. The premise on which the Petitioner relies, was first proffered by the Respondents in Williamson County Commissioners v. Hamilton Bank, 473 U.S. 172 (1985), "....that government regulation does not effect a taking for which the Fifth Amendment requires just compensation; instead, regulation that goes so far that it has the same effect as a taking by eminent domain is an invalid exercise of the police power, violative of the Due Process Clause of the Fourteenth Amendment."

In that case, however, this Court found that "[r]esolution of the Due Process question depends, in significant part, upon an analysis of the effect the Commission's application of the ordinance and regulations had on the value of respondent's property and investment-backed profit expectations. That effect cannot be measured until a final decision is made as to how the regulations will be applied to respondent's property. No such decision had been made at the time respondent filed its 1983 action, [473 U.S. 172, 174] because respondent failed to apply for variances from the regulations. Pp. 197-200." Unlike the respondent in Williamson County, 473 U.S. 172, Campbell has sought variances for his plans and was denied. This Court is now enabled to conduct it's further analysis, especially since the 1st Cir. Ct has declined to do so.

In similar cases, the injured parties have brought their claims under the Takings Clause of the 5th

Amendment. This Court has repeatedly found that a takings claim could not be prosecuted without first obtaining from the administrative agency "a final definitive position how it will apply the regulations at issue to the particular land in question."[Id. at 191] Furthermore, the Court requires the complainant to "seek compensation through the procedures the state has provided for doing so." [Id. at 194] Accordingly, a 5th Amendment claim will fail if an adequate remedy exists for obtaining compensation and "if resort to that process will yield compensation." [Id.]

The two types of Takings claims are physical appropriations and land use regulation. This case involves the latter class, but any analysis of the Petitioner's claim must consider whether the regulation is challenged on it's face or as it applies to the property in question. Even though the Petitioner chose not to pursue a Takings claim, Campbell has asked the 1st Cir. and this Court to determine the constitutionality of the Town's 1998 zoning amendments as they apply to locus. "The application of a general zoning law to a particular property effects a taking if the ordinance does not substantially advance legitimate state interests [see Nectow v. City Of Cambridge, 277 U.S. 183 (1928)] or denies an owner economically viable use of his land . [See Penn Central Transp Co. v. New York City 438 U.S. 104, 138, n.6 (1978)]" Agins v. City of Tiburon, 447 U.S. 225, at 261 (1980)

Campbell claims and has clearly shown that the Town and PB's actions to effect irrational, arbitrary and capricious zoning laws, with the sole intent to

circumvent the protections of M.G.L c. 40A, §3, is legislation that simply "goes too far" to effect any legitimate governmental interest. Previously stated, these actions are diametrically opposed to the legislative intent of the zoning exemptions given to daycare [developers]. M.G.L. c.40A, §3 (the Dover Amendment) limits the Town and PB's authority to decide on this issue. (See Appendix F, page App. 26)

The purpose of this legislation (noted in Petrucci v. Board of Appeals of Westwood, Land Court Misc. Case No. 219424) was to facilitate the establishment of childcare facilities and advance social policy. The House version of the legislation (House No. 5772 of 1990) stated:

> "... a serious emergency exists with respect to the shortage of quality affordable child care in Massachusetts... It is that factors inhibiting the supply and availability of child care facilities will be mitigated without corrective measures of the type hereinafter set forth."

In deciding Petrucci, Judge Lombardi noted "My reading of this section (§3 of M.G.L. c.40A) is that the Legislature was trying to state in explicit terms that a child care facility merits special protection. Lawmakers clearly did not want such uses to be frustrated by local zoning requirements."

"In deciding cases on M.G.L.A. c. 40A, §3, the limitations placed on local zoning control have been clearly defined. "...[C]hild care facilities may not be prohibited, nor made subject to a special permit requirement, but may be subject to reasonable

dimensional regulations." Brad Cartwright v. Town of Braintree, Land Court Misc. case No. 236228 at 5 and 6. The [Massachusetts] Appeals Court further found that, "the town may not, through the guise of regulating bulk and dimensional requirements under the enabling statute, proceed to 'nullify' the use exemption permitted to an educational institution." Bible Speaks v. Town of Lenox, 8 Mass. App. Ct 19, 31 (1979) (citing Sisters of the Holy Cross v. Brookline, 347 Mass. App. Ct. 486, 494 (1964)."[emphasis added] [Opp. to Town, pg.6]

In the decision on petitioner's appeal on the special permit (L.C. Docket #237269), Judge Green found that, "...the board's application of the by-law's special permit requirement to the plaintiff's application operated to nullify the protections afforded child care facilities under the Dover Amendment [M.G.L. c.40A §3], and did not "reasonably regulate" the proposed use." (*Id* at pg 10). Similarly in this situation, by proposing and enacting further restrictions on daycare facilities [Complaint- paras. 79-81] {"1998 Amendments"}, the Planning Board sought to circumvent the protections afforded {child care facilities[and their developers]} by M.G.L.A. c. 40A, §3. This, therefore, became the foundation of the Plaintiff's claims on appeal of the BZA's variance denial {on L.C. Docket #280041}. Campbell suggests that "circumvent" is intended to "deny" in this context.

To determine the validity or constitutionality of the 1998 Amendments, precedent support rests in Trustees of Tufts College v. Medford, 33 Mass. App. 580, 602 N.E.2d 1105 (1992). There, the [Mass.]

Appeals Court found that "ALM GL c.40A, §3 invalidates two types of zoning provisions: (1) those that are facially discriminate against the use of land for educational purposes whether by way of prohibition, site plan requirements, or special permit requirements; and (2) those that, although cast in form of non-discriminatory dimensional or parking space requirements, have the practical effect of nullifying use exemption permitted to [an] educational institution.

Although the 1998 Amendments are facially indiscriminate, any constitutional review on a procedural or substantive due process basis must consider the surrounding facts and circumstances and the {unlawful} procedures employed by the Planning Board to implement them.

Campbell insists that the Planning Board and Clarke, acting under the color of law, willfully and intentionally deceived other Town departments, Town Meeting and the {Massachusetts} Attorney General, in offering the 1998 Amendments as "reasonable regulation" to conceal their true purpose: repudiate the Dover Amendment at all costs.

Clearly, the Petitioner has succinctly stated a valid Due Process claim in his complaint before the DC and on Appeal to the 1st Cir. Ct., though both courts have rejected his arguments on either grounds: Substantive or Procedural Due Process. Under the usual standard of review, the Substantive Due Process prevents the government from engaging in conduct that "shocks the conscience," or interferes

with rights "implicit in the concept of ordered liberty." [United States v. Salerno, 481 U.S. 739, 746 (citations omitted)] The Petitioner alleges that the imposition of the 1998 zoning regulations was improper in the first place.

Because of the variety of Due Process claims, the various Courts of Appeals have interpreted and applied the wisdom of this Court's decision in Williamson County, 473 U.S. 172 to different degrees to fit the circumstances of their respective adjudications. In Pearson v. City of Grand Blanc, 961 F.2d 1211, 1215-16 (6th cir. 1992), the Sixth Circuit described six categories of claims raised in the context of zoning challenges: (1) just compensation takings; (2) due process takings; (3) arbitrary and capricious substantive due process; (4) equal protection; and (5) procedural due process; and, (6) First Amendment violations. The Sixth Circuit expressly declined to construe all zoning disputes as takings cases. "After exhaustive research, we find that this proposition [that all federal zoning cases should be treated as takings]-while it has the undoubted salutary advantage of minimizing the involvement of federal courts in local zoning-cannot be reconciled with current controlling precedent."[Id., at 1214]

Other circuits, notably the Tenth and Eleventh, have cited Pearson's discrete categories of zoning challenges with approval.[See Jacobs, Visconsi & Jacobs v. City of Lawrence, 927 F.2d 1111, 1115 (10th Cir. 1991)] But not all courts have embraced the idea that claims arising in the takings context could or even should fit into such discrete, distinctive

categories. Notably, the Ninth Circuit has held that "[a]ll as-applied challenges to regulatory takings, whether based on the just compensation clause, the due process clause, or the equal protection clause, possess the same ripeness requirement: a final determination by the relevant governmental body." S. Pac. Transp. Co. v. City of Los Angeles, 922 F.2d 498, at 507 (citations omitted)

"The Plaintiff...contends that the 1998 Amendments are unconstitutional and have deprived him the right to the use of locus for purposes protected by statutory regulations thereby violating the Due Process Clauses of the 5th and 14th Amendments in violation of 42 U.S.C. §1983. In Parrat v Taylor, 451 U.S. 527 (1981), the Supreme Court addressed issues related to a negligent deprivation of property, finding "(a) In any 1983 action the initial inquiry must focus on whether the two essential elements to a 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Id.* Pp. 531-535. Plaintiff contends both conditions have been satisfied by the facts presented." [Opp. to Town, pg.9]

"Unlike Parrat, Hudson v. Palmer, 468 U.S. 517 (1984) confronts intentional deprivation issues and equates them with negligent deprivation, finding that "...an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a

meaningful post deprivation remedy for the loss is available. For intentional, as for negligent deprivations of property by state employees, the state's action is not complete until and unless it provides or refuses to provide a suitable post deprivation remedy." *Id.* at 14 [468 U.S. 517, 534]." [Opp. to Town, pg.9]

"Although this also amounts to a violation of the Takings Clause of the 5th Amendment by inverse condemnation, the Plaintiff further insists that the remedy and relief available under M.G.L. c.79, §10 is inadequate to completely rectify the injuries caused by the Defendants' actions. Full remedy and relief is unavailable to the Plaintiff at the state level on several grounds, "Individual municipal employees were immune from personal liability on a claim under {Massachusetts} G.L. c.258, the Massachusetts Tort Claims Act, arising out of alleged gross negligence, where such a claim qualified as a "negligent or wrongful act or omission" under c.258, §2. Monahan v. Methuen, 408 Mass. 381, at 392 (1990) (See Appendix F, page App. 29)

"Where the public employer is a municipality, relief would be further denied to the Plaintiff on a state civil rights claim, since "...a municipality is not a "person" covered by the Massachusetts Civil Rights Act, (MCRA), G.L. c.12.§§ 11H, 11I" Howcroft v. City Of Peabody, Mass. App. Case No. 98-P-2151 (2001), at 22." [Opp. to Town, pg.10]

"The [Massachusetts] Appeals Court went on in Howcroft to compare the MCRA to §1983: "In

Batchelder v. Allied Stores Corp., 393 Mass. 819, 821 (1985), the court compared the provisions of §1983 with those of the MCRA; the MCRA, unlike §1983, is available "whether or not [the person or persons are] acting under color of law" (emphasis supplied). G. L. c. 12, §11H, inserted by St. 1979, c. 801, §1. Those observations regarding the absence of the need to show State action under the MCRA, however, did not dispose of the question whether a municipality is a "person" under the MCRA. That issue was expressly left open in Swanset Dev. Corp. v. Taunton, 423 Mass. 390, 391 (1996). As stated in note 15, supra, a municipality may be liable as a "person" under §1983, see Monell v. Department of Social Servs. of New York, 436 U.S. 658, 688, 694 (1978)", *Id.* at 23." [Opp. to Town, pg.10]

"From Howcroft footnote [15]:

> "The individual defendants in their official capacities are not "persons" under § 1983. See Laubinger v. Department of Rev., 41 Mass. App. Ct. 598, 602 (1996) ("the law treats the action as [one] against the official's office and hence against the State"), quoting from O'Malley v. Sheriff of Worcester County, 415 Mass. 132, 141 n.13 (1993). A municipality may be liable under §1983, see Monell v. Department of Social Servs. of New York, 436 U.S. 658, 688, 694 (1978), but only if the injury is caused by "officials whose acts may fairly be said to be those of the municipality," or if there is a municipal policy or custom that caused the injury. County Commrs. of Bryan

County v. Brown, 520 U.S. 397, 403-404 (1997)." [Opp. to Town, pg.11]

"Additionally, the Supreme Court found in D'Amico v. California, 389 U.S. 416 (1967) [citing McNeese v. Board of Education, 373 U.S. 668], "that one of the purposes underlying the Civil Rights Act was "to provide a remedy in the federal courts supplementary to any remedy any State might have," id., at 672, we held that "relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided [an administrative] remedy," id., at 671. See Monroe v. Pape, 365 U.S. 167, 180 -183" [Opp. to Town, pg.11]

"Monell [436 U.S. 658], defines a "person" as a body politic or corporate, and further found that, "[L]ocal governing bodies (and local officials sued in their official capacities) can, therefore, be sued directly under 1983 for monetary, declaratory, and injunctive relief in those situations where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted or promulgated by those whose edicts or acts may fairly be said to represent official policy." Pp. 690-691" [Opp. to Town, pg.11]

To the extent that the Lower Courts have regarded Petitioner's 2nd Complaint and Supplemental Pleadings to be defective with respect to a valid civil rights complaint alleging violations of §1983, Campbell humbly suggests that he has sufficiently raised other issues which cannot be subsumed under a 5th Amendment Takings claim. In responsive

pleadings, the Petitioner has asserted two additional claims which cannot and should not be passed over; that his rights to Freedom of Speech given by the Petitioning Clause of the First Amendment have been violated by the Town's retaliatory action; and, that the Town's 'unofficial' policy, but usual and customary practice of avoiding compliance with the Dover Amendment is discriminatory in nature and serve only to deny Campbell [and the entire class of daycare providers and daycare developers] of his rights to Equal Protection under the law, given by the Equal Protection Clause of the 14th Amendment. Campbell has asserted a valid claim of membership in this class, protected with vested rights given by the statute.

The 1st Cir. Ct. was required to "...review *de novo* an order dismissing a complaint for failure to state a claim for relief under Rule 12(b)(6), using the same standard applied by the district court." *See* Ordinance 59 Ass'n v. United States DOI Secy., 163 F.3d 1150, 1152 (10th Cir. 1998), "...accept[ing] as true all well-pleaded facts, as distinguished from conclusory allegations, and view[ing] those facts in the light most favorable to the nonmoving party." Maher v. Durango Metals, Inc., 144 F.3d 1302, 1304 (10th Cir. 1998). Dismissal of a complaint pursuant to Rule 12(b)(6) will be upheld only if "it appears beyond a doubt that the plaintiff can prove no set of [*4] facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). "The issue in reviewing the sufficiency of a complaint is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support [his]

claims." Ruiz v. McDonnell, 299 F.3d 1173, 1181 (10th Cir. 2002).

Because a pro se complaint "should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Hughes v. Rowe, 449 U.S. 5, 10, 101 S. Ct. 173, 174, 66 L. Ed. 2d 163 (1980). The DC's decision is based on the pleadings alone, despite a clear set of facts supporting his claims has been established by both the "detailed and exhaustive rendition of factual contentions"[1st Mem. & Ord. dtd 6/27/05, pg. 17, ¶2] Campbell makes [2d. Compl., pgs.4-30, ¶22 to 201] and the Documents Affidavits [L.C.-Docs. Aff.; DA-Town; and DA-Gild.].

The Plaintiff's Orig. Compl., 1st Compl. and 2nd Compl. are virtually identical in factual averments and amateur attempts to articulate his claims in acceptable terminology. Yet Campbell suggests that the DC's inferences from his faltering language miss the mark, especially with respect to his claims of civil rights violations. "When, as here, a litigant is proceeding pro se, we construe that litigant's ..... pleadings liberally and read such submissions to raise the strongest arguments they suggest." See Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994). "The rule favoring liberal construction of pro se submissions is especially applicable to civil rights claims." See Weixel v. Bd. of Ed. of the City of NY, 287 F.3d 138, 146 (2d Cir. 2002); and Haines v. Kerner, 404 U.S. 519, 520, 30 L. Ed. 2d 652, 92 S.Ct. 594, 596 (1972)(holding that pro se pleadings are

held to less stringent standards than counseled pleadings).

In order to survive a Rule 12(b)(6) motion to dismiss a § 1983 claim, a plaintiff must allege "(1) a violation of rights protected by the federal Constitution or created by federal statute or regulation, (2) proximately caused (3) by the conduct of a 'person' (4) who acted under color of any statute, ordinance, regulation, custom[,] or usage, of any State or Territory or the District of Columbia." Summum v. City of Ogden, 297 F.3d 995, 1000 (10th Cir. 2002) (quotation omitted). Campbell suggests that each of these conditions are easily confirmed by a liberal reading of his 2d. Compl.

Furthermore, if the DC considers that "no §1986 claim will lie where there is no valid § 1985 claim." See Posr v. Court Officer Shield No. 207, 180 F.3d at 419 (citation omitted), then the dismissal of §1986 claims with prejudice is an abuse of discretion and premature. Since the Court will allow further amendment on the §1985 claims, it cannot presume that there will be no valid §1986 claims resulting from the amended complaint. Campbell should have the opportunity to amend on both claims, *see* Amaker v. Weiner, 179 F.3d 48, 52 (2d Cir. 1999) (dismissal with or without prejudice)

"This case is analogous in some respects to Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977), where the respondent's standing was in question and the charges involved 14th Amendment Due Process violations. In that case, the respondent Metropolitan Housing Development Corp. ["MHDC"]

was found to have "...met the constitutional standing requirements by showing injury fairly traceable to the petitioner's acts." [precluding any requirement of ownership or title to the property MHDC sought to develop]. In further analogy to the instant case, the Supreme Court held that, "The challenged action of the Village [of Arlington Heights] stands as an absolute barrier to constructing the housing for which MHDC had contracted, a barrier which could be [429 U.S. 252, 253] removed if injunctive relief were granted." [Response-Show Cause, pgs.6-7]

"Furthermore the Supreme Court also reasoned that, "It has long been clear that economic injury is not the only kind of injury that can support a plaintiff's [429 U.S. 252, 263] standing." citing United States v. SCRAP, supra, at 686-687; Sierra Club v. Morton 405 U.S. 727, 734 (1972); Data Processing Service v. Camp, 397 U.S. 150, 154. Continuing the discussion from MHDC, "Clearly MHDC has met the constitutional requirements, and it therefore has standing to assert its own rights. Foremost among them is MHDC's right to be free of arbitrary or irrational zoning actions." Citing Euclid v. Amber Realty Co. 272 U.S. 365 (1926); Nectow v. City of Cambridge, 277 U.S. 183 (1928); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)." [Response-Show Cause, pg.7]

The current analysis of the civil rights claims suggests that the Planning Board exhibited some invidious class-based animus toward Campbell, and daycare developers in general, by developing and instituting a policy in direct opposition and in defiance to M.G.L. c. 40A, §3. "The historical

background of the [zoning] decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes." Citing Lane v. Wilson, supra; Griffin v. School Board, 377 US. 218, (1964); Davis v. Schnell, 81 F. Supp.872 (SD Ala.), af'd per curiam, 336 U.S. 933 (1949); cf. Keyes v. School Dist. No. 1 Denver, Colo, supra, at 207. The Court further noted that, "Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role." Id, at 268." [Response-Show Cause, pg.7]

Campbell argued on appeal that the DC's inferences from his faltering language miss the mark, especially with respect to his claims of civil rights violations. "[W]hen, as here, a litigant is proceeding pro se, we construe that litigant's ..... pleadings liberally and read such submissions to raise the strongest arguments they suggest." See Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994) particularly when, as here, the complaint alleges civil rights violations. See Weixel v. Bd. of Educ., 287 F.3d 138, 146 (2d Cir. 2002). Campbell claims his several Opposition Statements, with attached Documents Affidavits should be considered as Supplemental Pleadings, properly incorporated in his Complaint by reference, given that the documents submitted are public records.

The 1st Cir. Court previously held in cases dismissed under Rule 12(b)(6) that, "[T]hese principles require us to consider not only the complaint but also matters fairly incorporated within it and matters susceptible to judicial notice. Cruz v. Melecio, 204 F.3d 14, 21 (1st Cir. 2000); Beddall v. State St. Bank

& Trust Co., 137 F.3d 12, 16-17 (1st Cir. 1998); Lovelace v. Software Spectrum Inc., 78 F.3d 1015, 1017-18 (5th Cir. 1996). The first part of this rule is consistent with the axiom that a writing is the best evidence of its contents. See, e.g., Beddall, 137 F.3d at 16-17. The second part of this rule is consistent with the hoary tenet that a court "may look to matters of public record in deciding a Rule 12(b)(6) motion." Boateng v. Interamerican Univ., 210 F.3d 56, 60 (1st Cir. 2000). In re Colonial Mortg. Bankers Corp., 324 F.3d 12,15-16 (2003)

"Such a dismissal [on the basis of an affirmative defense] only can occur in an appropriate case. Two conditions must be met. The first condition is that the facts that establish the defense must be definitively ascertainable from the allegations of the complaint, the documents (if any) incorporated therein, matters of public record, and other matters of which the court may take judicial notice. The second condition is that the facts so gleaned must conclusively establish the affirmative defense. See Blackstone Realty LLC v. FDIC, 244 F.3d 193, 197 (1st Cir. 2001); LaChapelle v. Berkshire Life Ins. Co., 142 F.3d 507, 509 (1st Cir. 1998);" In re Colonial Mortg. Bankers Corp., 324 F.3d 12,15-16 (2003)

"[A] court may look to matters of public record in deciding a Rule 12(b)(6) motion without converting the motion into one for summary judgment. See Watterson v. Page, 987 F.2d 1, 3-4 (1st Cir. 1993). And a court ordinarily may treat documents from prior state court adjudications as public records. See Henson v. CSC Credit Servs., 29 F.3d 280, 284 (7th Cir. 1994) (collecting cases)." Boateng v.

Interamerican Univ., 210 F.3d 56, 60 (1st Cir. 2000) These principles justify this Court's inclusion of the several Opposition Statements with their attendant Documents Affidavits, and the L.C. proceedings as part of the record. The DC's error in excluding consideration of them to the detriment of Campbell's claims was clearly erroneous and reversible.

"When, as now, a complaint's factual allegations are expressly linked to and admittedly dependent upon a document (the authenticity of which is not challenged), that document effectively merges into the pleadings and the trial court can review it in deciding a motion to dismiss under Rule12(b)(6). See Fudge v. Penthouse Int'l, Ltd., 840 F.2d 1012, 1015 (1st Cir. 1988); see also Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994) ("[D]ocuments whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss."); 2 James Wm. Moore et al., Moore's Federal Practice 12.34[2](3d ed. 1997)(explaining that courts may consider "[u]ndisputed documents alleged or referenced in the complaint" in deciding a motion to dismiss); see generally Fed. R. Civ. P. 10(c)(stating that "[a] copy of any written instrument which is an exhibit to a pleading is a part thereof")." Beddall, 137 F.3d 12, 17 (1st Cir. 1998)

CONCLUSIONS

In any case, the Petitioner has obtained that final administrative determination required for ripeness, irrespective of the nature of the claims he chooses to pursue. Furthermore, the petitioner humbly suggests that his filings in the DC clearly state valid constitutional and federal claims, faulted as they may be, and that dismissal of his civil rights claims with prejudice was improprer.

In addition, the petitioner also suggests he has presented substantial questions with valid arguments on his appeal, which have not been addressed by the Judgment of the 1st Cir. Ct.. To this end, this Court now has an opportunity, obligation and the authority to resolve these disparites.

Wherefore, the Petitioner humbly askes this Honorable Court to grant this Petition and provide a dispositive response to the questions posed.

Dated: November 12, 2007

Respectfully Submitted,

/s/ Robert J. Campbell,
Petitioner, pro se
50 Squanto Road
North Weymouth, MA 02191
Ph: (781)335-4362

APPENDIX A – JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ENTERED MARCH 19, 2007

ROBERT J. CAMPBELL, Plaintiff-Appellant, CAMPBELL FAMILY INVESTMENT TRUST, Plaintiff, v. TOWN OF WEYMOUTH, et al., Defendants-Appellees, STANLEY ELKERTON, Defendant.

No. 06-1794

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

March 19, 2007, Decided

COUNSEL: For Plaintiff-Appellant: Robert J. Campbell, pro se, 50 Squanto Road, North Weymouth, Massachusetts 02191

For Defendants-Appellees Town of Weymouth, Paul M. Dillon, Mary Sue Ryan, Susan Abbott, Paul F. Lynch, James Clarke, Jeffrey R. Coates. Mary S. McElroy, Francis O'Brien, Edward Foley, Martin Joyce, Michael Nasuti and William Ryan: William P. Breen, Jr., Esq., Eckert, Seamans, Cherin & Mellott, LLC, Boston, Massachusetts.

For Defendant-Appellee Gildea: Stephen C. Warneck, Esq., Hingham, Massachusetts.

For Defendant-Appellee Amos: Gregory F. Galvin, Esq., East Weymouth, Massachusetts.

JUDGES: HON. KERMIT V. LIPEZ, HON. JEFFREY R. HOWARD, Circuit Judges, HON. LEVIN H. CAMPBELL, Senior Circuit Judge

JUDGMENT: Entered March, 19, 2007

After carefully reviewing the record in this case, we affirm the dismissal of plaintiff's civil rights claim alleging a violation of his right to substantive and/or procedural due process. We add only the following.

This court has "repeatedly held that rejections of development projects and refusals to issue building permits do not ordinarily implicate substantive due process." Torromeo v. Town of Fremont, NH, 438 F.3d 113, 118(1st Cir 2006). Violations of substantive due process are limited to "horrendous situations" and are not implicated simply by the fact that a board acts in violation of state law." Id. (citing cases). Nothing in the plaintiff's complaint suggests that the acts complained of rise to the level of a substantive due process violation.

Plaintiff's procedural due process claim fails because, even if denial of his request for a permit violates state law, the state provides an adequate post-deprivation remedy by allowing "[a]ny person aggrieved by a decision of the [zoning board of appeals] or any special permit granting authority" the right to seek judicial review of that decision. M.G.L. c.40A, § 17. This statute is an adequate

remedy for federal constitutional purposes. Chongris v. Board of Appeals of the Town of Andover, 811 F.2d 36, 44 (1st Cir. 1987).

Affirmed.

By the Court:
Richard Cushing Donovan, Clerk

By: Margaret Carter, Chief Deputy Clerk

APPENDIX B – ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS, GRANTING DEFENDANT'S' MOTIONS TO DISMISS ENTERED MARCH 17, 2006

ROBERT J. CAMPBELL, Plaintiff v. TOWN OF WEYMOUTH, et al., Defendants.

Civil Action No. 05-10620-WGY

UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

March 17, 2006, Decided

COUNSEL:

For Plaintiff: ROBERT J. CAMPBELL, pro se, 50 Squanto Road, North Weymouth, Massachusetts 02191

MURPHY, HESSE, TOOMEY & LEHANE, LLP. (by William P. Breen, Jr., Esq.), 300 Crown Colony Drive, Quincy, Massachusetts 02169, on behalf of Town of Weymouth, Paul M. Dillon, Mary Sue Ryan, Susan Abbott, Paul F. Lynch, James Clarke, Jeffrey R. Coates. Mary S. McElroy, Francis O'Brien, Edward Foley, Martin Joyce, Michael Nasuti and William Ryan.

WARNECK LAW OFFICES, (by Stephen C. Warneck, Esq.), 350 Lincoln Street, Suite 2400, Hingham,

Massachusetts 02043, on behalf of Sarah [Sandra] Gildea.

GREGORY F. GALVIN, ESQ., 775 Pleasant Street, Unit 16, Weymouth, Massachusetts 02189, on behalf of Ruth S. Amos.

JUDGE: HON. WILLIAM G. YOUNG, DistrictJudge

ORDER OF COURT: Entered March, 17, 2006

After a hearing held on 3/16/06, this Court orders that Defendant's Motions to Dismiss are Allowed without prejudice as to conspiracy, otherwise with prejudice as to all other claims and the above entitled action be and hereby is **Dismissed**.

Sarah A. Thornton, Clerk

By: /s/ Elizabeth Smith, Deputy Clerk

Dated March 17, 2006

APPENDIX C – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT GRANTING MOTION FOR ENLARGEMENT OF TIME TO FILE AND FOR LEAVE TO FILE OVERSIZE PETITION ENTERED APRIL 9, 2007

ROBERT J. CAMPBELL, Plaintiff-Appellant, CAMPBELL FAMILY INVESTMENT TRUST, Plaintiff, v. TOWN OF WEYMOUTH, et al., Defendants-Appellees, STANLEY ELKERTON, Defendant.

No. 06-1794

COUNSEL: For Plaintiff-Appellant: Robert J. Campbell, pro se, 50 Squanto Road, North Weymouth, Massachusetts 02191

For Defendants-Appellees Town of Weymouth, Paul M. Dillon, Mary Sue Ryan, Susan Abbott, Paul F. Lynch, James Clarke, Jeffrey R. Coates. Mary S. McElroy, Francis O'Brien, Edward Foley, Martin Joyce, Michael Nasuti and William Ryan: William P. Breen, Jr., Esq., Eckert, Seamans, Cherin & Mellott, LLC, Boston, Massachusetts.

For Defendant-Appellee Gildea: Stephen C. Warneck, Esq., Hingham, Massachusetts.

For Defendant-Appellee Amos: Gregory F. Galvin, Esq., East Weymouth, Massachusetts.

ORDER OF COURT: Entered April 9, 2007
Pursuant to 1st Cir. R. 27.0(d)

Appellant's motion for enlargement of time to file petition for rehearing enbanc and for leave to file oversize petition is **Granted**.

By the Court:
Richard Cushing Donovan, Clerk

By: Margaret Carter, Chief Deputy Clerk

APPENDIX D– ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DENYING PETITION FOR REHEARING EN BANC ENTERED JUNE 11, 2007

ROBERT J. CAMPBELL, Plaintiff-Appellant, CAMPBELL FAMILY INVESTMENT TRUST, Plaintiff, v.

TOWN OF WEYMOUTH, et al., Defendants-Appellees, STANLEY ELKERTON, Defendant.

No. 06-1794

COUNSEL: For Plaintiff-Appellant: Robert J. Campbell, pro se, 50 Squanto Road, North Weymouth, Massachusetts 02191

For Defendants-Appellees Town of Weymouth, Paul M. Dillon, Mary Sue Ryan, Susan Abbott, Paul F. Lynch, James Clarke, Jeffrey R. Coates. Mary S. McElroy, Francis O'Brien, Edward Foley, Martin Joyce, Michael Nasuti and William Ryan: William P. Breen, Jr., Esq., Eckert, Seamans, Cherin & Mellott, LLC, Boston, Massachusetts.

For Defendant-Appellee Gildea: Stephen C. Warneck, Esq., Hingham, Massachusetts.

For Defendant-Appellee Amos: Gregory F. Galvin, Esq., East Weymouth, Massachusetts.

JUDGES: HON. MICHAEL BOUDIN, Chief Judge, HON. LEVIN H. CAMPBELL, Senior Circuit Judge,

HON. JEFFREY R. HOWARD, HON. JUAN R. TORRUELLA, HON. SANDRA L. LYNCH, HON. KERMIT V. LIPEZ, and HON. JEFFREY R. HOWARD, Circuit Judges,

ORDER OF COURT: Entered June 11, 2007

The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be **Denied**.

By the Court:
Richard Cushing Donovan, Clerk

By: Amy B. Lederer, Appeals Attorney.

APPENDIX E – TRANSCRIPT OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS, MOTION HEARING HELD MARCH 16, 2006

Civil Action No. 05-10620-WGY

ROBERT J. CAMPBELL, et al., Plaintiffs v. TOWN OF WEYMOUTH, et al., Defendants.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BEFORE: HON. WILLIAM G. YOUNG, District Judge

APPEARANCES:

ROBERT J. CAMPBELL, pro se, 50 Squanto Road, North Weymouth, Massachusetts 02191

MURPHY, HESSE, TOOMEY & LEHANE, LLP. (by William P. Breen, Jr., Esq.), 300 Crown Colony Drive, Quincy, Massachusetts 02169, on behalf of Town of Weymouth, et al.

WARNECK LAW OFFICES, (by Stephen C. Warneck, Esq.), 350 Lincoln Street, Suite 2400, Hingham, Massachusetts 02043, on behalf of Sarah [Sandra] Gildea.

GREGORY F. GALVIN, ESQ., 775 Pleasant Street, Unit 16, Weymouth, Massachusetts 02189, on behalf of Ruth S. Amos.

1 Courthouse Way
Boston, Massachusetts

March 16, 2006

THE CLERK: Civil Action 05-10620, Campbell v. Weymouth, et al.
MR. BREEN: All Parties. Third call, please, your Honor.
THE COURT: Right. Is Mr. Campbell --
MR. CAMPBELL: Yes.
THE COURT: Mr. Campbell, you're representing yourself and you have every right to represent yourself, sir. But this is not a trial. This is the motion session. Things are technical. And so, I, in fairness, I should ask you, do you intend to get an attorney in this case?
MR. CAMPBELL: I'm diligently trying to retain the services on a contingent basis, your Honor.
THE COURT: Well, would you like me to put this off, not an overlong time, but say for a month, so you can get an attorney and then see if he wants to revise the objection here, and I'll consider that on the papers. Or do you want to argue it today?
MR. CAMPBELL: Well. I think I would like to argue the issues at least for today, your Honor.
THE COURT: Very well. That is your right and you have every right. Third call.

(Whereupon other matters were heard by the Court and then the following transpired.)

THE CLERK: Civil Action 05-10620, Campbell v. Weymouth, et al.

THE COURT: All right, Mr. Campbell has identified himself, and would counsel identify themselves.

MR. BREEN: Your Honor, my name is William Breen. I represent all of the Defendants with the exception of Ms. Gildea and Ms. Amos. With me today is George Lane, a member of the bar and the city solicitor for the Town of Weymouth.

MR. LANE: Good afternoon, your Honor.

THE COURT: Good afternoon.

MR. WARNECK: Your Honor, Steve Warneck. I represent Sandra Gildea. And she's actually here. Is it possible to have her sit with us at counsel table or should she stay here?

THE COURT: She may if she wishes.

MR. GALVIN: Good afternoon, your Honor. Gregory Galvin representing Ruth Amos.

THE COURT: All right. Mr. Campbell, this is, it's their motion and it's a motion to dismiss. They're trying to get your case thrown out right now before we go any further.

MR. CAMPBELL: I understand, your Honor.

THE COURT: Under the law I have to take everything that you have pleaded as true. And more than that, I have to draw all inferences your way. It doesn't mean I agree with it, but we don't care whether I agree with it or not, the question is whether you are going to get a trial.

What we care is whether, when I take everything your way, you could get a trial. Now, their

major argument here is twofold. One, that you've just waited too long. There are, there are statutes of limitation. Too long. I don't speak to the merits at all, but too much time has gone by before you started this action.

The other argument that's here is that the civil rights laws simply don't exist to allow a Court of the United States to sit in judgment of local zoning matters and local town matters where the Courts of the Commonwealth are all set up to do that and have their system of review and the like.

Why shouldn't I dismiss your case in light of these legal principles?

MR. CAMPBELL: First of all, your Honor, I believe, as I understand the rules, a motion to dismiss for failure to state a claim on which relief could be granted under Rule 12(b)(6) also allows – well, first of all, it enables the Court to decide the issues of law as a matter of summary judgment on Rule -- it interprets that motion --

THE COURT: I could convert the case to a motion for summary judgment, but I can't do that without giving everyone notice. And the way I framed it to you, because that's the argument I want to hear, I don't think I – why would I do that? They say treat it as a motion to dismiss, Judge. Believe everything he says. Draw all the inferences his way. He's out of time. Or this is just a thinly veiled attempt to review local zoning boards, and you can't do that, Judge. That's their argument.

Why isn't that right?

MR. CAMPBELL: Well, first of all, your Honor, I would suggest that there are several different dates

which you could consider as the appropriate point for tolling.

THE COURT: All right. What do you think I should consider?

MR. CAMPBELL: Well, I think the defense in all regards has derived that point in time to be February 6, 2002 and that was the hearing for the board of zoning appeals decision on my application for a variance.

THE COURT: And if that's right you're too late because it's a three year statute.

MR. CAMPBELL: Well, I would suggest that there are other factors which would extend or allow you at least to consider a different time frame.

THE COURT: I follow your argument. Why should I go to a date more recent than that?

MR. CAMPBELL: Well, first of all, your Honor, in terms of jurisdiction of this Court, I believe that a civil, a plaintiff should know, or the point in time is when the plaintiff knows or should have known of his injuries as a result of the actions being claimed.

THE COURT: That's properly stated. Correct.

MR. CAMPBELL: There is additional consideration along that same reasoning that, although injury may be known, whether or not that injury rises to a constitutional violation may be judged on two different standards. In other words, an injury that, that could be remedied by the state law is not necessarily a constitutional violation. But if information presents itself after the point in time that you're first considering that raises the cause of action to a constitutional offense, then I would suggest the appropriate time frame to consider would be the point in time when the person becomes aware

of the constitutional violation. And I think in this case, your Honor, there are sufficient facts that would indicate, first of all, that the injury, or rather, the single event of a zoning board denying a variance is an issue that is easily disposed of at the state level. But where the action that's challenged had some undisclosed features, characteristics, or some other attributes which were not immediately known on the surface, then once those, once that information is uncovered, say through discovery, as in this case --

THE COURT: Suppose you are right. What about their second argument, that you, that this doesn't, in view of the due process that the Commonwealth of Massachusetts affords all its citizens you're in the wrong court here; you've got to pursue things in state courts.

MR. CAMPBELL: Well, if I may just add on additional issue as far as the jurisdiction and the time frame. I believe there is precedent in Fajardo v. INS which allows that the limitation period on a motion can be tolled until the time petitioner became aware of the harm resulting from the fraudulent misconduct.

THE COURT: Yes, you've argued that and I have it mind, but I want to go to the second issue in the time you have available.

MR. CAMPBELL: Sure.

THE COURT: Why – what is the constitutional violation here?

MR. CAMPBELL: Well, first of all, I believe that the defense is considering my claim to be an inverse condemnation claim which again is individually an issue that could be disposed of at the state level under General Laws 79, Section 10, I believe. I think

that – first of all, this is, this is not an issue that should properly be considered inverse condemnation. Because there is sufficient indication that the action complained of is an unjust enforcement of police power. It's an encroachment on my rights to due process. So, rather than considering this as an issue of inverse condemnation, I believe that the 1998 bylaws that were enacted by the town in a questionable manner were constitutionally – rather, they were unconstitutional and that they had gone too far, they exceed the authority of the planning board.

THE COURT: And isn't that a matter for the state courts?

MR. CAMPBELL: No, I don't believe it is, your Honor. First of all, there is a serious question of individual liability and people, and the actions that were deliberately taken by individuals. I, I think that in an official capacity the Massachusetts tort law grants an immunity for officials for actions taken by municipal officials in their official capacity and puts the liability on the employer. In this case the employer is a municipality, your Honor. And under the Massachusetts Civil Rights Act, a municipality is not considered a person under the law. Therefore, ther is insuffici9ent remedy available at the state level. And it raises the issue to the federal jurisdiction where Section 1983 does consider a municipality to be a person under the law.

THE COURT: And you think, you think that that's a significant difference, that a municipality is at least theoretically subject to suit. You can sue all the individuals.

MR. CAMPBELL: Well. I believe the only way to properly resolve the issue is to repair the law, and

suing the individuals in their individual capacity does not or would not invalidate the law or repeal it.

THE COURT: Where in this complaint is there adequate averments, allegations now, because I have to take everything, where is there, where are there adequate allegations that support a conspiracy against you as opposed to a general approach to governing the town?

MR. CAMPBELL: Well, first of all, your Honor, I have to suggest that the town as a person has enacted a policy which refuses to comply with the state law. The planning board in particular has taken a position that they will never comply with the exemptions provided by Massachusetts general Law, Chapter 40A, Section 3. I believe sufficient evidence exists to prove that this is, we can't necessarily call it an official policy because of its invidious purposes, but we can suggest that it is customary practice for the town itself. And not that it's applied solely to me, but it has extended beyond me to other areas. In this particular case, I refer to the Naval Air Station in South Weymouth where the three most experienced zoning members or zoning officials in the town developed a policy to extend the town's policy onto the base that will be acquired from the U.S. Navy.

Now, as far as it being directed specifically at me, your Honor, the same town officials that had developed and implemented this policy on the base had originally decided on my special permit application in 1996, where they denied it in 1997, they have taken other actions specifically related to my application and my proceedings in the town. So that the only experience that these zoning officials had with Chapter 40A. Section 3 were the direct result of their experience with my applications.

There were no previous applications relying on Chapter 40A, Section 3 exemptions. There were not contemporaneous applications relying on Chapter 40A, Section3 exemptions. The only experience the town had in this regards was with my situation.

THE COURT: Well, Mr. Campbell, I have carefully reviewed this. And I do think that your complaint as to a number of these defendants survives the statute of limitations claim, but I simply do not think as pleaded it adequately states a conspiracy against any of these people, specifically as to you, with the intent to deprive you individually as opposed to some general rule of the equal protections of the law. Further, I rule that there is here no substantive or procedural due process violation.

Now, you have two – and I'm dismissing your complaint.

Now, since I've dismissed it on a motion to dismiss and in one part of it, but only one, the failure of the conspiracy claims, they're not adequately pleaded. And so that's without prejudice to your making a motion to amend your complaint yet again and adequately plead a timely conspiracy, if you can do that in good faith.

The other thing you can do is , of course, you can appeal. Because I'm not deciding any of these things. I'm just making a ruling as matter of law. And the appellate court will have to look at it just as I have. They'll have to give all inferences your way and take everything you have pleaded as true.

I've done that. But nevertheless, I think the complaint must be dismissed. It's dismissed with prejudice as to everything but the conspiracy claim. That's without prejudice. Before filing an

amendment there has to be a motion for leave to amend, and I'll review that and the defense can oppose that.

That's the ruling of the Court.

(Whereupon the matter concluded.)

CERTIFICATE

I, Donald E. Womack, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

/s/ Donald E. Womack
Official Court Reporter
P.O. Box 51062
Boston, Massachusetts 02205-1062
Womack@megatran.com

APPENDIX F – Text of APPLICABLE CONSTITUTIONAL PROVISIONS, CODES, STATUTES, AND BYLAWS

Constitution of the United States:

Amendment I - Free Speech and Petition Clauses

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Amendment V - Due Process, Just Compensation and Equal Protection Clauses

"No person...shall be...deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV – Due Process and Equal Protection Clauses

Section 1. "...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Code ("U.S.C.")

Title 28 U.S.C. § 1254.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Title 28 U.S.C. § 1291.

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292 (c) and (d) and 1295 of this title.

Title 28 U.S.C. § 1331.

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Title 28 U.S.C. § 1343.

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs

mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Title 28 U.S.C. §1441.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

Title 42 U.S.C. §1983.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party

injured in an action at law, suit in equity, or other proper proceeding for redress..."

Title 42 U.S.C. §1985.

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Title 42 U.S.C. § 1986

Every person who, having knowledge that any of the wrongsconspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

Title 42 U.S.C. § 1988

(a) Applicability of statutory and common law. The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with

the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

Massachusetts General Laws (M.G.L.)
Massachusetts Civil Rights Act (MCRA)
Chapter 12, Section 11H

Section 11H. Whenever any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, the attorney general may bring a civil action for injunctive or other appropriate equitable relief in order to protect the peaceable exercise or enjoyment of the right or rights secured. Said civil action shall be brought in the name of the commonwealth and shall be instituted either in the superior court for the county in which the conduct complained of

occurred or in the superior court for the county in which the person whose conduct complained of resides or has his principal place of business.

Chapter 12: Section 11I

Section 11I. Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with, as described in section 11H, may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief as provided for in said section, including the award of compensatory money damages. Any aggrieved person or persons who prevail in an action authorized by this section shall be entitled to an award of the costs of the litigation and reasonable attorneys' fees in an amount to be fixed by the court.

Chapter 40A Section 3

§ 3. (In pertinent part) ¶3 No zoning ordinance or bylaw in any city or town shall prohibit, or require a special permit for, the use of land or structures, or the expansion of existing structures, for the primary, accessory or incidental purpose of operating a child care facility; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements. As used in this

paragraph, the term ""child care facility" shall mean a day care center or a school age child care program, as those terms are defined in section nine of chapter twenty-eight A.

Chapter 40A: Section 17

§17. (In pertinent part) Any person aggrieved by a decision of the board of appeals or any special permit granting authority or by the failure of the board of appeals to take final action concerning any appeal, application or petition within the required time or by the failure of any special permit granting authority to take final action concerning any application for a special permit within the required time, whether or not previously a party to the proceeding, or any municipal officer or board may appeal to the land court department, the superior court department in which the land concerned is situated or, if the land is situated in Hampden county, either to said superior court department or to the division of the housing court department for said county, or if the land is situated in a county, region or area served by a division of the housing court department either to said superior court department or to the division of said housing court department for said county, region or area, or to the division of the district court department within whose jurisdiction the land is situated except in Hampden county, by bringing an action within twenty days after the decision has been filed in the office of the city or town clerk. If said appeal is made to said division of the district court department, any party shall have the right to file a claim for trial of said appeal in the

superior court department within twenty-five days after service on the appeal is completed, subject to such rules as the supreme judicial court may prescribe. Notice of the action with a copy of the complaint shall be given to such city or town clerk so as to be received within such twenty days. The complaint shall allege that the decision exceeds the authority of the board or authority, and any facts pertinent to the issue, and shall contain a prayer that the decision be annulled. There shall be attached to the complaint a copy of the decision appealed from, bearing the date of filing thereof, certified by the city or town clerk with whom the decision was filed.

Chapter 79: Section 10

§10. When the real estate of any person has been taken for the public use or has been damaged by the construction, maintenance, operation, alteration, repair or discontinuance of a public improvement or has been entered for a public purpose, but such taking, entry or damage was not effected by or in accordance with a formal vote or order of the board of officers of a body politic or corporate duly authorized by law, or when the personal property of any person has been damaged, seized, destroyed or used for a public purpose, and by such taking, damage, entry, seizure, destruction or use he has suffered an injury for which he is entitled to compensation, the damages therefor may be recovered under this chapter. If the injury was caused by or on behalf of the commonwealth or of a county, city, town or district, the officer or board of officers under whose direction or control the injury was caused

shall award the damages upon the petition of any person entitled thereto. If the injury was caused by a railroad corporation, the county commissioners of the county in which the property taken, damaged, entered upon, seized, destroyed or used was located, and, if the injury was caused by a private corporation other than a railroad, the aldermen of the city or the selectmen of the town in which such property was located, shall award the damages upon the petition of any person entitled thereto or of the corporation liable therefor. In case of a specific taking, entry, seizure or other act causing destruction or damage or depriving the owner of the use of his property permanently or for a definite period of time the damages shall be assessed as of the date of such taking, entry, seizure or other act and the right thereto shall vest on such date and a petition for an award of damages therefor under this section may be filed within one year thereafter; otherwise damages shall be assessed with respect to any parcel of property as of the date when such property was first injuriously affected, the right thereto shall vest upon the completion of the public improvement which caused the injury, and a petition for an award of damages therefor under this section may be filed within one year after such completion.

Chapter 258: Section 2

§2. Public employers shall be liable for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment, in the same manner and

to the same extent as a private individual under like circumstances, except that public employers shall not be liable to levy of execution on any real and personal property to satisfy judgment, and shall not be liable for interest prior to judgment or for punitive damages or for any amount in excess of one hundred thousand dollars. The remedies provided by this chapter shall be exclusive of any other civil action or proceeding by reason of the same subject matter against the public employer or, the public employee or his estate whose negligent or wrongful act or omission gave rise to such claim, and no such public employee or the estate of such public employee shall be liable for any injury or loss of property or personal injury or death caused by his negligent or wrongful act or omission while acting within the scope of his office or employment; provided, however, that a public employee shall provide reasonable cooperation to the public employer in the defense of any action brought under this chapter. Failure to provide such reasonable cooperation on the part of a public employee shall cause the public employee to be jointly liable with the public employer, to the extent that the failure to provide reasonable cooperation prejudiced the defense of the action. Information obtained from the public employee in providing such reasonable cooperation may not be used as evidence in any disciplinary action against the employee. Final judgment in an action brought against a public employer under this chapter shall constitute a complete bar to any action by a party to such judgment against such

public employer or public employee by reason of the same subject matter.

Notwithstanding that a public employee shall not be liable for negligent or wrongful acts as described in the preceding paragraph, if a cause of action is improperly commenced against a public employee of the commonwealth alleging injury or loss of property or personal injury or death as the result of the negligent or wrongful act or omission of such employee, said employee may request representation by the public attorney of the commonwealth. The public attorney shall defend the public employee with respect to the cause of action at no cost to the public employee; provided, however, that the public attorney determines that the public employee was acting within the scope of his office or employment at the time of the alleged loss, injury, or death, and, further, that said public employee provides reasonable cooperation to the public employer and public attorney in the defense of any action arising out of the same subject matter. If, in the opinion of the public attorney, representation of the public employee, under this paragraph would result in a conflict of interest, the public attorney shall not be required to represent the public employee. Under said circumstances, the commonwealth shall reimburse the public employee for reasonable attorney fees incurred by the public employee in his defense of the cause of action; provided, however, that the same conditions exist which are required for representation of said employee by the public attorney under this paragraph.

Chapter 231: Section 59H

§59H. In any case in which a party asserts that the civil claims, counterclaims, or cross claims against said party are based on said party's exercise of its right of petition under the constitution of the United States or of the commonwealth, said party may bring a special motion to dismiss. The court shall advance any such special motion so that it may be heard and determined as expeditiously as possible. The court shall grant such special motion, unless the party against whom such special motion is made shows that: (1) the moving party's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) the moving party's acts caused actual injury to the responding party. In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

The attorney general, on his behalf or on behalf of any government agency or subdivision to which the moving party's acts were directed, may intervene to defend or otherwise support the moving party on such special motion.

All discovery proceedings shall be stayed upon the filing of the special motion under this section; provided, however, that the court, on motion and after a hearing and for good cause shown, may order that specified discovery be conducted. The stay of discovery shall remain in effect until notice of entry of the order ruling on the special motion.

Said special motion to dismiss may be filed within sixty days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper.

If the court grants such special motion to dismiss, the court shall award the moving party costs and reasonable attorney's fees, including those incurred for the special motion and any related discovery matters. Nothing in this section shall affect or preclude the right of the moving party to any remedy otherwise authorized by law.

As used in this section, the words "a party's exercise of its right of petition" shall mean any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government.

APPENDIX G – DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT AND ORDER OF REMAND OF THE COMMONWEALTH OF MASSACHUSETTS LAND COURT, DEPARTMENT OF THE TRIAL COURT

Miscellaneous Case No. 237269

ENTERED SEPTEMBER 23, 1998

ROBERT J. CAMPBELL & another[1], Plaintiffs, v. TOWN OF WEYMOUTH & others[2], Defendants

COUNSEL:

MORISI AND ASSOCIATES, PC (By James N. Doherty, Esq.), 1400 Hancock Street, 3rd Floor, Quincy, Massachusetts 02169, on behalf of Plaintiffs

LAW OFFICES OF GEORGE E. LANE, JR., (By George E. Lane, III, Esq.), 84 Broad Street, Weymouth, Massachusetts 02188, on behalf of Town of Weymouth, et al.

JUSTICE: HON. MARK V. GREEN

OPINION: By complaint filed on march 27, 1997, and amended on July 7, 1998, plaintiffs appeal, pursuant to G.L.

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[1] Tammy A. Campbell

[2] Weymouth Planning Board, Paul M. Dillion. Mary Sue Ryan, Paul Hurley, Susan L. Abbott, Mary S. McElroy, Robert S. Lang and Paul F. Lynch, as they are members of the Weymouth Planning Board, Jeffrey R. Coates, as he is the Weymouth Building Inspector.

c.40A §17,[3] a decision of the defendant planning board of Weymouth (board) to deny their application for a special permit, and seek, pursuant to G.L. c. 240, §14A,[4] a determination of the applicability of certain provisions of the Weymouth Zoning Bylaw (by-law) to their property. The subject matter of the action is plaintiffs' proposal to construct and operate a child care facility on certain property located at and known as lot 3A, Neck Street, in Weymouth (locus). Plaintiffs claim that their proposed use may not be made subject to a requirement for a special permit, by reason of the provisions of G.L. c. 40A, §3, and that the board's denial of their application for a special permit is therefore a nullity. Alternatively, plaintiffs claim that the board's denial of their application was improper even if a special permit may be required.

A hearing was held on September 2, 1998, on cross-motions for summary judgment. Counsel representing both parties appeared and presented argument at the hearing, and both submitted written memoranda in support of their respective positions. The record for purposes of summary judgment consists of various documents and plans authenticated under two affidavits of James N. Doherty, Esq.,

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[3] Both the original complaint and the amended complaint state that the action is an appeal of the building inspector's denial of plaintiff's application for a building permit. However, the relief sought by plaintiffs in the §17 appeal is an annulment of the board's denial of their special permit application. In any event, since the plaintiffs did not take an administrative appeal of the building inspector's action to the zoning board of appeals, their appeal of the building inspector's denial of their permit application is not properly before me. G.L. c.40A §§8, 15.

[4] The count for declaratory relief was brought by amendment to the complaint, allowed on July 7, 1998. The amended complaint refers to G.L. 214, §14A, which does not exist. Based on the issues raised in the count for declaratory relief, I understand the reference to be an error through inadvertence, and consider it as having been brought under G.L. c.240, §14A.

counsel for plaintiffs, dated February 18, 1998, and August 14, 1998, respectively.

The following facts are not in dispute:

1. Locus is a parcel of land approximately 15,000 square feet in area, with 164.34 feet of frontage along Neck Street approaching and including, the corner of Davids island road. Locus is situated within the Residential District R-1 established under the by-law. Locus is also situated within the Floodplain District, a so-called "overlay" district established under the by-law, and is within an area designated the Federal Emergency Management Agency as special flood hazard zone A4.
2. Locus is owned of record by Francis Campbell and Ruth Campbell, as trustees of Campbell Family Investment Trust, by deed dated April 4, 1997, and recorded with the Norfolk County registry of deeds on April 7, 1997 at 3:22 p.m.[5]
3. In 1996, the building inspector denied an application by Searles Builders, Inc. (Searles), for a building permit to construct a child care facility on locus, stating as the reason for his action that the by-law requires a special permit for such construction on land in the flood plain district designated special flood hazard area A4.

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[5] An action for declaratory relief under G.L. c. 240, §14A, is available to an "owner of a freehold estate in possession in land." Though defendants have not challenged plaintiffs' standing on that account, the nature of plaintiffs' ownership in locus, if any, is not revealed by the record. I view the request for declaratory relief as appropriate for disposition nonetheless because (i) the request for declaratory relief appropriately may be considered within the scope of plaintiffs appeal under G.L. c40A, §17, and (ii) by their arguments the parties have each addressed the subject matter of plaintiff's claim for declaratory relief.

4. Section 120-38.3D of the by-law provides, in pertinent part

   "In addition to all provisions of this bylaw that affect the underlying district, the following additional procedures shall apply for all filling, permitted uses, special permitted uses and substantial improvements of any structure [the cost of which equals or exceeds fifty percent (50%) of the market value of the structure] where any portion of such lies within the various floodplain zones as stipulated below....

5. Section 120-38.4.B of the by-law sets forth criteria for special permit applications made thereunder. It provides

   "B. The special permit granting authority may approve any application for a special permit where specified in §120-38.3D(3) only if it finds that, in its judgment, all of the following criteria are met:

   (1) The subject land is not subject to flooding or, if Subsection B(1) is not proven, then:

   (2) The subject land is not unsuitable because of drainage conditions on-site as well as on abutting properties upstream and downstream.

   (3) The proposed activity will not increase the water surface elevation of the one-hundred-year flood at any point within the town."

6. Section 120-38.5 sets forth certain construction criteria applicable to any special permit use granted within the one-hundred-year floodplain, including the requirements that all new construction of non-residential structures be floodproofed to a point at least one foot above the one-hundred-year elevation, and that all applicable state and federal permits be obtained prior to issuance of the special permit.

7. Searles filed an application for a special permit with the board on or about November 1, 1996. The application proposed a child care facility containing

approximately 2,600 square feet af floor area on two floors, for a maximum capacity of fifty-three children and eight staff people at full enrollment. The proposed structure met all applicable dimensional requirements for a structure in the Resident District R-1. No habitable or storage space within the proposed building was proposed to be below the floodplain elevation, and the top of the foundation was to be at least one foot above the floodplain elevation. During the course of the board's review of the proposal, Searles provided the board with drainage calculations showing minor increases in stormwater runoff resulting from the proposed facility, and with an evacuation plan detailing the means by which occupants of the facility would be evacuated in case of a flood emergency during periods of operation.

8. The board held a public hearing on the application, which opened on December 16, 1996, continued to January 13, 1997, continued again to February 10, 1997, and continued again to February 24, 1997. At the close of the hearing on February 24, 1997, the board voted to deny the application for a special permit. In a written decision filed with the town clerk on March 7, 1997, the board stated the following as the reason for its decision:

> "It is a floodplain and criteria for decisions in the floodplain include the health, safety and welfare of the occupants. The area is subject to flooding and a day care for fifty-three children in the floodplain is hazardous to the well-being of those children and not an appropriate location."

9. Searles appealed the board's decision by complaint in this action filed March 27, 1997. Plaintiffs were substituted for Searles by assented motion filed and allowed on November 25, 1997.

* * * * *

Summary judgment is appropriate in the instant case because there are no genuine issues of any material facts which would preclude disposition as a matter of law. Community Nat'l Bank v. Dawes, 369 Mass.550, 553-556 (1976); Mass R. Civ. P. 56 (c).

The gravamen of plaintiff's claim is that section 135-611 violates the protection afforded child day care uses by G.L. c.40A §3 (the Dover Amendment), ¶3. Under that statute, child care facilities may not be prohibited, nor made subject to a special permit requirement, but may be subject to reasonable dimensional regulations.[6]

As observed in three recent decisions in this court, no appellate decision has yet considered the third paragraph of the Dover Amendment. See Petrucci v. Board of Zoning Appeals of Westwood, Land Court Misc. Case No. 219424 (February 5, 1996 and March 18, 1997) (Lombardi, J.); Cartwright v. Town of Braintree, Land Court Misc. Case No. 236228 (December 16, 1997) (Green, J.)[7] As also noted in those decisions, however, the provisions of the third paragraph are sufficiently similar to the protections afforded other uses under those other provisions of the Dover

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[6] G.L. c.40A §3, ¶3 provides

> No zoning ordinance or bylaw in any city or town shall prohibit, or require a special permit for, the use of land or structures, or expansion of existing structures, for the primary, accessory or incidental purpose of operating a child care facility; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements. As used in this paragraph, the term "child care facility" shall mean a day care center or a school age child care program, as those terms are defined in section nine of chapter twenty-eight A.

[7] An appeal of the decision in Petrucci dated March 18, 1997 is currently pending before the Appeals Court (Docket No. 97-P-1057, entered May 22, 1997).

Amendment to warrant reasoning by analogy to decisions in cases decided under those other provisions. Both Petrucci and Cartwright considered the reasonableness of dimensional requirements imposed on child care facilities by analogy to cases decided under ¶2 of the Dover Amendment involving educational or religious uses. Like the instant case, Petrucci also considered the effect of prohibition against a special permit requirement contained in ¶3.[8]

Some guidance for the instant case may be found in Prime v. Zoning Board of Appeals of Norwell, 42 Mass. App. Ct. 796 (1997). Prime held that a special permit may be required to regulate the construction of new buildings for agricultural use, so long as that application of the special permit requirement does not nullify the protection afforded agricultural uses under ¶1 of the Dover Amendment. In Prime, the Appeals Court upheld the application of a special permit requirement to regulate new structures in an aquifer protection overlay district, notwithstanding that the proposed farm stand was to be for agricultural use.[9] However, following the analysis in Cumberland Farms of Conn., Inc. v. Zoning Board of Appeal of N. Attleboro, 359 Mass. 68 (1971), and Kirker v. Board of Appeals of Raynham, 33 Mass App. Ct. 111 (1992), the Court observed that "the special permit requirement may not be imposed unreasonably and in a manner designed to prohibit the operation of the farm stand, nor may the permit be denied merely because the board would prefer a different use of the locus, or no use." Prime, 42 Mass. App. Ct. at 802-803

The holding in Prime turned in part on the specific language of ¶1.[10] The first sentence of ¶1 contains several

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[8] Petrucci proposed renovation of an existing barn for use as a child care facility rather than construction of a new building proposed by plaintiffs. As discussed below, I believe the distinction makes a difference.

[9] The Appeals Court in Prime also upheld a second provision of the Norwell by-law which required a special permit for the proposed farm stand.

[10] Paragraph one of the Dover Amendment provides, in pertinent part

clauses. In one clause, the sentence forbids the imposition of a special permit requirement "for the use of land for[agricultural purposes]," and does not mention the use or construction of structures for such purposes. In a separate clause, the sentence forbids the imposition of a special permit requirement "for the use, expansion or reconstruction of existing structures thereon for [agricultural purposes]." Prime notes that, under it's analysis, "the provision of [the Dover Amendment] precluding a special permit for existing agricultural structures remains intact." Prime, 42 Mass. App. Ct. at 802.

Plaintiffs argue that the language in ¶3 is different from the language in ¶1 in a material respect. By contrast to ¶1, the first sentence of ¶3 addresses special permits in a single clause. It forbids requiring a special permit for the "use of land or structures, or the expansion of existing structures for [a child care facility]." Plaintiffs argue that, unlike the language in ¶1, the general prohibition in ¶3 against a special permit requirement refers to the use of both land and structures. Both paragraphs prohibit requiring a special permit for the expansion of existing structures for the protected use. Both also prohibit requiring a special permit for the use of land for the protected use. Unlike ¶1, ¶3 prohibits requiring a special permit for the use of structures for a child care facility. Accordingly, plaintiffs contend, ¶3 does not distinguish between new and existing structures in the same manner as ¶1, and ¶3's prohibition against requiring a special permit for use of structures for a child care facility extends to both new and existing structures.

"No zoning ordinance or by-law shall ...prohibit, unreasonably regulate or require a special permit for the use of land for the primary purpose of agriculture, floriculture, or viticulture; nor prohibit, or unreasonably regulate, or require a special permit for the use expansion, or reconstruction of existing structures thereon for the primary purpose of agriculture, horticulture, floriculture or viticulture...."

Though the language of the two paragraphs is different in the manner observed by the plaintiffs, I do not share plaintiffs' conclusion regarding the effect of the difference. Plaintiffs' reading of ¶3 would render superfluous the language forbidding requirement of a special permit for the expansion of existing structures; if construction of new structures is within the scope of the language that prohibits a special permit for 'the use of land or structures," then expansion of existing structures would be within the same language, and no additional language would be needed to forbid a requirement of a special permit for expansion of existing structures. See Roblin Hope Indus., Inc. v. J.A. Sullivan Corp., 6 Mass. App. Ct. 481, 486 (1978) (a statute should be interpreted so that none of the words is treated as superfluous). Accordingly, I conclude that a zoning by-law may require a special permit for the construction of a new structure to be used as a child care facility just as, under Prime, it may require a special permit for the construction of a new structure to be used for agricultural purposes.[11]

However, as in Prime, "the special permit requirement may not be imposed unreasonably and in a manner designed to prohibit the operation of the farm stand, nor may the permit be denied merely because the board would prefer a different use, or no use." Prime, 42 Mass. App. Ct. at 802-803. The record in this case amply suggests that the board would prefer a different use of locus than the

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[11] Plaintiffs do not argue that the requirement of a special permit for all uses in areas designated "A4" in the floodplain overlay district violates the uniformity requirement of G.L. c. 40A, §4, and so I do not consider the question. As noted, Prime upheld a special permit requirement applicable in an aquifer overlay district, but the by-law in that case (as described in the decision of this court in miscellaneous case no. 165788, February 14, 1996 (Kilborn, J.)) appears not to have required a special permit for all uses. But see Boch v. Barwick, [L]and [C]ourt [M]iscellaneous [N]o. (sic) 199441, January 21, 1997 (Scheier, J.); SCIT, Inc. v. Planning Board of Braintree, 19 Mass. App. Ct. 101, 106-108 (1984).

proposed child care facility. Plaintiffs' proposal meets each of the specific design and performance criteria specified in §§120-38.4 and 120-38.5 of the bylaw. Plaintiffs have submitted evidence of at least four special permits recently granted by the board for residential structures in the vicinity of locus. At the board's request, plaintiffs prepared and submitted a detailed evacuation plan, to address potential life safety concerns associated with the use of locus for a child care facility. Rather than impose reasonable conditions on the proposed facility, however, the board voted to deny the plaintiffs' application.[12] Review of the minutes of the hearings conducted by the board on the plaintiffs' application makes clear that the board was concerned with noise and traffic which might be generated from the proposed facility. The decision itself states explicitly the board's view that locus is not an appropriate location for the proposed use.

Taken as a whole, the board's application of the by-law's special permit requirement to plaintiffs' application operated to nullify the protections afforded child care facilities under the Dover Amendment, and did not "reasonably regulate" the proposed use. By analogy to the protection of agricultural uses recognized in Cumberland Farms, Kirker and Prime, the board's decision violates the protection afforded child care facilities under ¶3 of the Dover Amendment.

Plaintiffs motion for summary judgment is allowed, and the defendants' cross-motion is denied. The decision of the board to deny plaintiffs' application for special permit is annulled, and the matter is remanded to the board for further proceedings consistent with this decision. The board shall, within twenty-eight (28) days following the date of this decision, hold a public hearing in this matter and shall render and file its decision with the Weymouth town clerk within

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[12] "Of course, the imposition of conditions would be subject to de novo review as outlined in the Cumberland decision." Prime, 42 Mass. App. Ct. at 802

fourteen (14) days thereafter. Notice of such hearing shall be given pursuant to G.L. c.40A, §11 and c.39, §23B, and such hearing, and the decision pursuant thereto, shall conform to the requirements of G.L. c.40A, §15. This court shall retain jurisdiction for purposes of any necessary review of the board's further proceedings.

So ordered.

/s/ Mark V. Green
Justice

Dated: September 23, 1998

APPENDIX H – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DENYING MOTION TO STAY MANDATE ENTERED OCTOBER 10, 2007

ROBERT J. CAMPBELL, Plaintiff-Appellant, CAMPBELL FAMILY INVESTMENT TRUST, Plaintiff, v. TOWN OF WEYMOUTH, et al., Defendants-Appellees, STANLEY ELKERTON, Defendant.

No. 06-1794

COUNSEL: For Plaintiff-Appellant: Robert J. Campbell, pro se, 50 Squanto Road, North Weymouth, Massachusetts 02191

For Defendants-Appellees Town of Weymouth, Paul M. Dillon, Mary Sue Ryan, Susan Abbott, Paul F. Lynch, James Clarke, Jeffrey R. Coates. Mary S. McElroy, Francis O'Brien, Edward Foley, Martin Joyce, Michael Nasuti and William Ryan: William P. Breen, Jr., Esq., Eckert, Seamans, Cherin & Mellott, LLC, Boston, Massachusetts.

For Defendant-Appellee Gildea: Stephen C. Warneck, Esq., Hingham, Massachusetts.

For Defendant-Appellee Amos: Gregory F. Galvin, Esq., East Weymouth. Massachusetts.

BEFORE: HON. MICHAEL BOUDIN, Chief Judge, HON. JUAN R. TORRUELLA, and HON. SANDRA L. LYNCH, Circuit Judges

ORDER OF COURT: Entered October 10, 2007

Mandate issued in this case on June 27, 2007. Therefore, treating appellant's request as a request to withdraw mandate, the request is **Denied.**

By the Court:
Richard Cushing Donovan, Clerk

By: Margaret Carter, Chief Deputy Clerk

APPENDIX I – MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS ENTERED JUNE 27, 2005

ROBERT J. CAMPBELL & THE CAMPBELL FAMILY INVESTMENT TRUST, PlaintiffS v. TOWN OF WEYMOUTH, et al., Defendants.

Civil Action No. 05-10620-WGY

YOUNG, C. J.

MEMORANDUM AND ORDER

For the reasons stated herein: (1) Robert J. Campbell's Motion For Leave To Amend the Complaint is granted, subject to this Memorandum and Order; (2) Robert J. Campbell's application to proceed without prepayment of fees is denied without prejudice; (3) Robert J. Campbell is directed to show cause within 35 days why the action should not be dismissed for failure to state a claim and/or to show standing; (4) Co-Plaintiff The Campbell Family Investment Trust is dismissed as a party without prejudice for failure to sign the First Amended Complaint, failure to pay the filing fee and failure to be represented by counsel; and (5) Robert J. Campbell'sfs Motion to Expunge criminal record is denied.

BACKGROUND

On March 14, 2005, Plaintiff Robert J. Campbell ("Campbell") filed a *pro se* Complaint

alleging violations of 42 U.S.C. §§1983, 1985, and 1986, claiming that the Defendants, zoning board members and affiliates, violated his due process rights and his right to "freedom from repression," with respect to the issuance of zoning and building permits. Accompanying his Complaint was an Application to Proceed Without Prepayment of Fees.

More specifically, on or about February 1996, Campbell submitted building permit applications to the Town of Weymouth Building Inspector seeking permission to use one of his lots for residential purposes and the other lot for use as a daycare. Compl. at ¶26. Since both lots were located in a residential district and in a designated flood hazard zone, the Building Inspector refused to issue the permits, and informed Campbell that he must seek special permits to build on the land. Id. ¶27. Campbell did as instructed.

After Public hearings on April 22 and June 17, 1996, the Planning Board approved Campbell's special permit for construction on his residential lot. Id. ¶30. With respect to the other lot, Campbell withdrew his special permit application for the daycare because the application contained "substantial errors." Id. ¶31. The Town Board allowed the withdrawal, without prejudice, on May, 28, 1996. Id. ¶31.

About five months later, on November 1, 1996, Campbell submitted a second application for a special permit to build the daycare. Id. ¶41. While that application was pending, the Town Board proposed changes to the minimum lot requirements in the Town bylaws. Id. ¶43. The amendments were approved by the Town Board in May 1997 and went into effect in August 1997. These amendments

required minimum parking requirements to include additional off-street parking. Id. ¶78. Campbell amended the building plans in accordance with the new requirements. Id. ¶45.

On February 24, 1997, the Board denied the special permit for the daycare. Id. ¶67. After this denial, Campbell appealed the decidion to the Massachusetts Land Court (Docket No. 237269). Id. ¶68. Campbell concedes that the lot was not actually purchased until April 1997, and further concedes that it is The Campbell Family Investment Trust (Francis Campbell and Ruth Campbell, trustees) that is the owner of record for the property. Id. ¶73-74.

Campbell claims that while litigating his appeal in the Massachusetts Land Court, the Town Board attempted to further amend the business application process to require applicants to submit to a Criminal Offense Records Investigation ("CORI"). Id. ¶87. Campbell claims that this action was taken specifically by the Town Board in order to provide grounds for denial of any applications submitted by Campbell in the future. Id. ¶90.

In September 1998, the Massachusetts Land Court granted Summary Judgment in favor of Campbell and remanded the case back the Planning Board. Id. ¶93. Pursuant to the remand order, the Planning Board granted Campbell's special permit in November 1998. Id. ¶94. Due to monetary and contractual problems, however, Campbell was unable to build the daycare within the time allotted. When the special permit was due to expire in November 2000, Campbell applied for a building permit to continue building the daycare. Id. ¶124.

On December 28, 2001, Campbell applied to the Board of Zoning Appeals ("BZA") for both a

special permit and variance. Id. ¶140. The BZA approved the special permit but denied the variance. Id. ¶144. Campbell then brought a second appeal to the Massachusetts Land Court (Docket No. 280041) Id. ¶155. Plaintiff's Complaint does not specify the outcome of this case.

Campbell requests this Court to (1) remove certain bylaws of the Town of Weymouth; (2) grant injunctive relief barring certain defendants from continuing to involve themselves in his building plans; (3) award damages for his costs incurred thus far in seeking permits; (4) award punitive damages; (5) and expunge his criminal record.

On May 26, 2005 Campbell filed a Motion to Amend the Complaint to add new parties and delete his wife as a party. He also filed further financial disclosures in support of the application to preceed *informa pauperis,* signed by Francis Campbell, Trustee for The Campbell Family Investment Trust.

The Campbell Family Investment Trust ("Trust") is also named as a co-Plaintiff in this action; however, no authorized signatory has signed the Complaint or the First Amended Complaint. These deficiencies are addresses in more detail in this Memorandum and Order.

DISCUSSION

I. Robert J. Campbell's Motion to Amend the Complaint

Robert J. Campbell's Motion For Leave To Amend the Complaint is granted. "A party may amend the the party's pleading once as a matter of course at any time before a responsive pleading is served." Fed. R. Civ. P. 15(a). Accordingly, since no responsive

pleading has been served or filed, the motion is granted, and the clerk is directed to file the pleading as the "First Amended Complaint." The grant of the motion is still subject to the filing fee requirements (or waiver thereof) and other requirements as set forth in this Memorandum and Order.

The First Amended Complaint makes several changes. First, Tammy Campbell's name is removed and replaced with the Trust as the real party in interest. See Amended Complaint at ¶2. Second, the First Amended Complaint deletes claims against Richard McLeod and Donald Holzworth. Id. ¶5. These Defendants shall be terminated as parties in this action. Third, the following persons shall be added by this Court to the docket as Defendants: Paul M. Dillon, Mary Sue Ryan, Susan Abbott, Paul F. Lynch, Officer Michael Nasuti, Sandra Gildea, Ruth S. Amos and William Ryan. Id. ¶6. Fourth, Campbell asserts that this Court's jurisdiction includes 28 U.S.C. §1441. Fifth, references to M.G.L. Chapter 43A Section 3 are now recognized as M.G.L. Chapter 40A Section 3. Sixth, references to Chapter 30A Section 11 ½ (1)(a) through (c) are now recognized as Chapter 39A Section 23B (1)(a) through (c). Finally, other typographical errors are corrected in the Amended Complaint.

II. The Court May Screen This Action

Because Campbell has sought to proceed without prepayment of fees, this court may screen the complaint pursuant to 28 U.S.C. §1915. Section 1915, authorizes federal courts to dismiss actions in which a plaintiff seeks to proceed without prepayment of the filing fee if the action lacks an arguable basis either in law or in fact, Neitzke v. Williams, 490 U.S.

319, 325 (1989) (interpreting former §1915 (d)), or if the action fails to state a claim on which relief may be granted or seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. §1915(e)(2). *In forma pauperis* complaints may be dismissed sua sponte and without notice under §if the claim is based on an indisputably meritless legal theory, or factual allegations that are clearly baseless. if the claim is based on an indisputably meritless legal theory, or factual allegations that are clearly baseless. Id.; Denton v. Hernandez, 504 U.S. 25, 32-33 (1992).

III. Applications to Proceed *In Forma Pauperis*[1]

A. Robert J. Campbell's Application To Proceed *In Forma Pauperis*

Campbell's Application to Proceed Without Prepayment of Fees is denied without prejudice, because he has made an insufficient showing that he lacks funds to pay the filing fee. Campbell indicates he owns property totaling $326,700.00, including a house, two cars and a boat. He fails to provide information as to the amount of equity in his home,

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[1] The practice of this Court has been to apportion the filing fee among Plaintiffs. See, e.g., Gordon v. Maloney, C.A. No. 03-10205-DPW (D. Mass. July 9, 2003) (Woodlock, J.); Matthews v. Allen, C.A. No. 02-11922-RWZ (D. Mass. June 26, 2003) (Zobel, J.); and Wickers, et al. v. Sheriff Cousins, et al., C.A. No. 05-10172-RCL (D. Mass. February 23, 2005) (Lindsay, J.). Ordinarily, since the Complaint names two Plaintiffs (Campbell and The Campbell Family Investment Trust), the fee would be split between the two, so Campbell's portion of the filing fee would be $125.00. However, since the co-Plaintiff Trust is not recognized by this Court as a duly appearing Plaintiff in this action, for the reasons stated herein, no such apportionment of the fee can be assessed in any event.

nor does he provide information as to other assets such as stocks, bonds or other funds or income, if any in his name or his spouse's name, or his spouse's income. Thus, based on the current disclosures, this Court finds he has not demonstrated that he is without sufficient funds to pay the filing fee. Although, he references two bankruptcy proceedings, Campbell fails to disclose specific details that would impact the Court's determination regarding his eligibility for *in forma pauperis* status.

In view of the above the Application to Proceed Without Prepayment of fees is denied without prejudice. He may submit a new Application to Proceed Without Prepayment of Fees and affidavit and include in that application a more detailed financial statement. If Campbell resubmits his application, he must do so contemporaneously with the filing of a response to this show cause order as set forth herein.

B. The Campbell Family Investment Trust's Application To Proceed *In Forma Pauperis*

Franc[i]s [sic] Campbell, Trustee for Trust, submitted an Application to Proceed Without Prepayment of Fees contemporaneous with the Motion to Amend the Complaint. Since Trust has failed to sign either the original Complaint or the First Amended Complaint, this Court does not recognize the Trust as a party to this proceeding at this time, and therefore need not entertain the Application.

However, the Court finds that even if the Trust properly submitted a signed Complaint, the Application to proceed *in forma pauperis* is nevertheless defective. Francis Campbell appears to have disclosed his personal assets in the Application.

However, the Trustee's personal assets are irrelevant to the issue of the Trust's ability to pay the filing fee.

More importantly, however, regardless of its financial status, a Trust is not a "person" within the meaning of 28 U.S.C. §1915 and is therefore not entitled to *in forma pauperis* or a waiver of the filing fee. Rowland v. California Men's Colony, 506 U.S. 194, 196 (1993) ("...only a natural person may qualify for treatment *in forma pauperis* under §1915.")[2]

This is fatal to the trust's request to waive the filing fee. Accordingly, if the Trust seeks to appear in this action as a aprty, it must pay the filing fee. Additionally, the Trust must also show cause why this action should not be dismissed for the reasons stated herein, and Plaintiff Campbell shall make all reasonable efforts to ensure the Trust receives notice of this Memorandum and order.

IV. Failure of Campbell Family Trust to Sign pleadings; A Pro Se Litigant May Not represent Others

Plaintiff Campbell is the only signatory to the Complaint and the Forst Amended Complaint, and it

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[2] In Rowland, the Supreme Court of the United States reasoned: 1) since Congress gave the courts discretion under §1915 (d) to appoint counsel to represent a person, the legislature assumed that the person first had the legal capacity to appear in front of the court (a corporation does not enjoythis right); 2) an "allegation of poverty" requires a person to show that they are "lacking in the comforts of life," a "human condition" that can not be attributed to artificial entities; 3) artificial entities are not permitted to take oaths and therefore can not legally make an affidavit as required by §1915 (a); and 4) the standard used to determine "inability to pay," asking whether a person lacks the "necessities of life" is not applicable to artificial entities and the Congressional record is devoid of any other standard that could be applied to them. Rowland, 506 U.S. at 201-207.

appears he is attempting to represent the Trust in this action. Although 28 U.S.C. §1654 permits persons to proceed *pro se*, this provision does not allow unlicensed lay people to represent co-plaintiffs or any other individuals. See Feliciano v. DuBois, 846 F.Supp. 1033, 1039 (D. Mass. 1994); Eagle Assocs. V. Bank of Montreal, 926 F.2d 1305, 1308 (2nd Cir. 1991). Additionally, this Court's Local rules do not provide such authorization. See District of Massachusetts Local Rule 83.5.3(c), providing that "[a] person who is not a member of the bar of this court, and to whom sections (a) and (b)are not applicable, will be allowed to appear and practice before the court only in his own behalf." Id. Thus, each named plaintiff may only litigate his *own* claims, and Campbell may not appear *pro se* on behalf of the Trust. Additionally, each individual plaintiff wishing to file a pleading with this court must sign the pleading. See Fed. R. Civ. P. 11(a).

Although Francis Campbell, trustee has filed an Application to Proceed *in forma pauperis*, the signature of the Trustee is absent from the Complaint and the First Amended Complaint, and therefore the pleading shall be stricken as to him, without prejudice. "an unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party." Fed. R. Civ. P. 11(a)

It is further noted that the First Amended complaint fails to reference any claims of the Trust that are separate and distinct from Campbell's claims. Thus to the extent that the Trust would seek to refile the First Amended Complaint containing an authorized signatory, such action would nevertheless

be subject to dismissal for the same reasons contained in this Memorandum and Order.

V. The Campbell Family Investment Trust May Not Appear *Pro Se*

Apart from the deficiencies previously noted with respect to the filing fee and lack of authorized signature to the First Amendeed Complaint, a more fundamental problem is presented here, which would warrant dismissal of this action. Francis Campbell, as Trustee, and/or Robert Campbell, as beneficiary, are seeking to represent the Trust's interests in this case. While the Trustee of the Trust may have standing to bring suit, neither a beneficiary nor Trustee may appear *pro se* on behalfof the Trust entity. A Trust must be represented by duly-licen[s]ed [sic] counsel.

As previously noted, 28 U.S.C. §1654 does not allow unlicensed lay-people to represent any other individuals. See Feliciano, 846 F. Supp. At 1039; Eagle Assocs v. Bank of Montreal, 926 F.2d 1305, 1308 (2nd Cir. 1991). This rule applies to a Trust. See Rowland v. California Men's Colony, 506 U.S. 194, 202 (1993) ("the rationale for that rule applies equally to all artificial entities."); See also C.E. Pope Equity Trust v. U.S., 818 F.2d 696, 697 (9th Cir 1987) ("A trustee may not claim that his status as trustee includes the right to present arguments *pro se* in federal court."); Knoefler v. United Bank of Bismarck, 20 F.3d 347 (8th Cir. 1994). (Trustees have no right to represent a trust in a United States Court.")

Accordingly, if (as presumed) Francis Campbell is an unlicensed layperson, he may not represent the interests of the Campbell Family Investment Trust. If the Trust seeks to participate as a litigant in this

action, it must be represented by counsel, who must enter a Notice of Appearance on behalf of the Trust, in compliance with this Court's Local Rules. See Local Rule 83.5.2(a).

VI. Plaintiff's Section 1983 Claims

A. Robert Campbell Lacks Standing to Bring the Complaint Because He Suffered No Actual Injury

To the extent that the First Amended Complaint alleges the deprivation of Campbell's own property rights, he lacks standing to bring such a complaint. According to the Complaint, Robert J. Campbell does not own the property in question, nor does he appear to be an authorized representative of the owner. The First Amended Complaint states that the land is deeded to the Trust, and does not indicate that Campbell is a co-owner of the property or a Trustee of the Trust. Compl. at ¶74. therefore the action is subject to dismissal because Campbell lacks standing to bring such a Complaint.

Moreover, even if Campbell had standing to bring suit, he fails to show that an actual property right guaranteed by the Constitution, has been abridged by any Defendants in this action. For a civil rights claim regarding zoning laws, the Plaintiff must show that his constitutional property right has beed abridged. See Chiplin Enterprises, Inc. v. City of Lebanon, 712 F.2d 1524, 1527 (1st Cir. 1983); Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 829 (1st Cir. 1982). The Complaint states facts to the contrary. Admittedly, Plaintiff spent both time and money to obtain planning and building permits, but ultimately those permits *were granted.* See Complaint at ¶¶30, 90 & 144. Therefore, since Campbell neither owns the property nor

demonstrates that he was ultimately denied the use of that property, his claims are subject to dismissal.

B. Available Adequate State Law Remedies exist to Rectify Campbell's Procedural Due Process Claim

Even if Campbell were to establish standing, an adequate state law remedy appears to exist to rectify his claims. To the extent that Campbell's claim is interpreted as a procedural due process claim, it is not yet ripe for determination in this Court, because adequate state law remedies appear to exist to rectify his alleged violations. A plaintiff seeking relief regarding land use regulations cannot seek relief in federal court where adequate post-deprivation remedies exist under state law. See Hudson v. Palmer, 468 U.S. 517, 531-533 (1984); Parrat v. Taylor, 451 U.S. 527, 541 (1981) overruled in part, Daniels v. Williams, 474 U.S. 327 (1986).

The Supreme Court in Parratt held that where a state provides a post-deprivation remedy in suits relating to unlawful taking of property, the aggrieved person's procedural due process rights are satisfied. See Id. Since it appears that Campbell may seek redress in the state courts of Massachusetts under a claim for inverse condemnation his procedural due process rights are adequately protected by state law. See Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 186-87 (1985) (holding that where plaintiff had failed to seek relief in Tennessee state court regarding zoning laws, the cause of action was not ripe for federal determination.)

The First Circuit has held that a §1983 takings claim is not ripe until the plaintiff has sought remedy under state inverse condemnation law. See

Ocha Realty Corp. v. Faria. 815 F.2d 812, 816-17 (1st Cir. (Puerto Rico) 1987) ("Since we have held that the exhaustion of state law remedies...is a precondition to the maintenance of a federal damages action under the Takings Clause...we must perforce hold that the district court correctly dismissed the Fifth Amendment claims for money damages as premature.") The First Circuit determined that even though Puerto Rico did not have a specific inverse condemnation statute, the judiciary had allowed causes of action and therefore the plaintiff had a remedy under state law. See Id.

Unlike Puerto Rico, the Commonwealth of Massachusetts explicitly provides a damage remedy for inverse condemnation. See M.G.L. c. 79, §10. It is not entirely clear, but it appears that Campbell has failed thus far to seek remedy under this statute, and therefore the case is not yet ripe for federal judicial review.

This District has had occasion to deal with this stautory scheme. See Gilbert v. City of Cambridge, 745 F. Supp. 42 (D. Mass. 1990). In Gilbert, judge Woodlock concluded that in addition to damages claims, plaintiffs could not seek any declaratory judgment until they have sought redress under the inverse condemnation statute. Id. at 53 (regarding declaratory relief the Court stated that the "injury is effectively the equivalent of the damages inquiry which Williamson and Ochoa require to be deferred by the federal court until state proceedings are finalized.") The Plaintiff landlords in Gilbert claimed that a Cambridge ordinance restricting their ability to remove their property from the rental market constituted a state taking. Id. at 43. Judge Woodlock found the claims to be time barred, and further noted

that even if no time bar existed, the Court would refuse to use its discretion to hear the case because the Plaintiff had adequate state law remedies available. Id. at 51-52. judge Woodlock's opinion states, "[t]he Massachusetts inverse condemnation statute expressly provides for compensation '[w]hen the real estate of any person has been taken.' M.G.L. c.79, §10. 'Mass.Gen.L. ch. 79 §10 providea a specific statutoryremedy for governmental actions which amount to a taking without formal condemnation proceedings.'" Id. at 52

Accordingly, unless Campbell demonstrates that no adequate state law remedy exists, this Court would decline to use its discretionary power to hear the case and to grant injunctive relief.

C. Statute of Limitations

In the alternative, should Campbell show that no adequate state remedy exists, his claims may nevertheless be barred in this Court, in view of the three-year statute of limitations on civil rights actions.[3]

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[3] Although there is no specified Statute of Limitations for causes of action brought under federal civil rights laws, it is well settled that the applicable state Statute of Limitations is applied where the action is filed. Thus, in federal civil rights cases filed in this District, the applicable statute of limitations is three years. Nieves v. McSweeney, 241 F.3d 46 52-53 *1st Cir. 2001) (§1983); Johnson v. Rodriguez, 943 F.2d 104, 107 (1st Cir. 1991)(§1981); Govan v. Trustees Of Boston Univ., 66 F. Supp. 2d 74, 80 (D. Mass, 1999) (§§1981, 1985). See also Owens v. Okure, 488 U.S. 235 (1989); Wilson v. Garcia, 471 U.S. 261 (1985); Street v. Vose, 936 F.2d 38, 29 (1st Cir. 1991) (per curiam) (the Massachusetts statute of limitations applies to §1983 actions). Cf. Rodriguez-Garcia v. Municipality of Caguas, 354 F.3d 91, 96 (1st Cir. 2004) (§§1981, 1983 and 1985 borrow from the state's statute of limitations for personal injury

This Circuit recognizes that "[a]lthough state law determines the tolling provisions of the applicable statute, it is federal law that determines when these constitutional claims accrue." Perez-Ruiz v. Crespo-Guillen, 847 F. Supp. 1, 2 (D. Puerto Rico 1993) *aff'd* 25 F.3d 40 (1st Cir. 1994) citing Edwards v. Sotomayer, 557 F. Supp.209, 213 (D. Puerto Rico 1983) citing Walden III, Inc. v. Rhode Island, 576 F,2d 945 (1st Cir. 1978); Singleton v. N.Y., 632 F.2d 185, 191 (2nd Cir. 1980). A §1983 cause of action accrues when a plaintiff knows, or has reason to know, of the injury which is the basis of the action; when facts supportive of a civil rights action are obvious, or should be obvious, to a reasonably prudent person similarly situated. Edwards, 557 F. Supp. At 214; Carreras-Rosa 127 F.3d 172, 174 (1st Cir. 1997).

Since this action was commenced on March 14, 2005, in order to escape the statutory bar, the acts giving rise to the present action must have arisen after march 13, 2002. from the Plaintiff's detailed and exhaustive rendition of factual contentions, it appears that he knew or should have known of the alleged conspiracy well before march of 2002. the last possible violation that may be construed from the Complaint is the Board of Zoning Appeal's denial of Campbell's request for a variance. This denial occurred on December 28, 2001. Compl. ¶144. Therefore, the latest possible time that Campbell could have filed his Section 1983 Complaint was December 28, 2004. However, Campbell did not

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claims); M.G.L. c.260, §2A (three-year statute of limitations for personal injury claims). Thus as a threshold matter, if Campbell's claims were not brought within the three year limitations period after accrual, they are subject to dismissal.

initiate this suit until march 14, 2005, almost three months after the statute of limitations period expired. Thus, Campbell's suit is subject to dismissal as barred by the statute of limitations.

D. Campbell's Complaint does not show a Substantive Due Process Violation

Even if this Court were to construe Campbell's assertions as a substantive due process claim, his allegations are not sufficient to warrant redress. This is so, even where Campbell cklaims that the actions by officials were malicious and/or not in accordance with state law.

A substantive due process claim differs from a procedural due process claim because it "implicates the essence of state action rather than it's modalities; such a claim rests not on the perceived procedural deficiencies but on the idea that the government's conduct, regardless of procedural swaddling, was in itself impermissible," Amsden v. Moran, 904 F.2d 748,753 (d. N.H. 1990). For a claim of violation of substantive due process the plaintiff must show that the "state action [] in and of itself [is] egregiously unacceptable, outrageous, or conscience-shocking." Id. at 754.

This Circuit has held that a plaintiff's claim charging zoning officials with improper refusal of a subdivision plan did not rise "to the level of a violation of the Constitution of the United States." Creative Environments, Inc., 680 F.2d at 289. In that case, the plaintiffs claimed that the town laws were a "'distortion of the existing [state] statutory and regulatory scheme,'" and thus violated their substantive due process rights. Id. at 831. The court rejected this argument, finding that:

> [W]ere such a theory to be accepted, any hope of maintaining separation between federal and state jurisdiction in this and many other areas of law would be jettisoned. Virtually every alleged legal or procedural error of a local planning authority or zoning board of appeal could be brought to a federal court on the theory that the erroneous application of state law amounted to a taking of property without due process. Neither Congress nor the courts have, to date, indicated that section 1983 should have such a reach.

Id. See Chiplin Enterprises, Inc., 712 F.2d at 1527 ("The claim that denial of the permit was improperly motivated, unsupported by an allegation of the deprivation of a specific constitutional right, simply raises a matter of local concern, properly and fully reviewable [sic] in state courts.").

Thus, Campbell's contentions of improper motives by the Defendants are insufficient to warrant redress at this time.

VII. Plaintiff's Other Civil Rights Claims

A. Plaintiff's Section 1983 Claims

Section 1985 of Title 42 concerns conspiracies to violate civil rights. Section 1985(1) deals with conspiracies to prevent persons from holding officd or performing duties of a public office. Section 1985(2) pertains to conspiracies to obstruct justice or to interfere with witnesses. Section 198593) deals with conspiracies intended to deprive an individual or class of persons of protectected rights based n "

racialm or perhaps other-wise class-based, invidiously discriminatory animus." Aulson v. Blanchard, 83 F.3d 1, 3 (1st Cir.1996) (quoting Griffith v. Breckenridge, 403 U.S. 88, 102 (1971)).

Campbell fails to assert which subsections of §1985 the defendants allegedly violated. However, based on the facts as alleged, the Court finds no basis for a cause of action under subsections (1) or (3). Campbell makes no allegations that he ran for office, or that he is a member of a minority group. Therefore, the Complaint does not allege facts to constitute an action under these subsections.

Construing Campbell's assertion as an alleged violation of aconspiracy under §a985(2), the claim is subject to dismissal for failure to comply with Rule 8(a) of the Federal Rules of Civil Procedure.

A complaint must meet the minimum requirements of Rule 8(a) of the Federal Rules of Civil Procedure requiring a plaintiff to include in their complaint, inter alia, "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed R. Civ. P. 8(a)(2). This statement must "give the defendant fair notice of what the plaintiff's claim is and the grounds on which it rests." Rivera v. Rhode Island, 402 F.3d 27, 33 (1st Cir. 2005) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)), such that the defendant is afforded a "meaningful opportunity to mount a defense," Diaz-Rivera v. Rivera-Rodriguez, 377 F.3d 119, 123 (1st Cir. 2004)). "In a civil rights action..., the complaint should at least set forth minimal facts as to who did what to whom, when, where and why." Educators PuertorriqueZos en Accion v. Hernandez, 367 F.3d 61, 68 (1st Cir. 2004). Although "the requirements of Rule 8(a)(2) are minimal...minimal requirements are

not tantamou[illegible]o non-existent requirements." Id. (quoting Gooley v. Mobil Oil Corp., 851 F.2d 513, 514 (1st Cir. 1988)).

Under §1985(2), Campbell must plead a conspiracy between Town officials to impede, hinder, or obstruct justice, and that the Defendants did so with the intent to deny equal protection to Campbell, or to injure Campbell's person or property in retaliation for Campbell's enforcing his equal protection rights. See 42 U.S.C. §1985(2).

While Campbell alleges a multitude of adverse actions taken against him with respect to his permit applications, he fails to demonstrate how these actions amounted to an intended conspiracy to deprive him of his constitution rights. The mere conclusory allegation of a conspiracy, without more, is insufficient to state a legally cognizable claim. Therefore Campbell's §1985 claim is subject to dismissal.

B. Plaintiff's Section 1986 Claims

A violation of §1985 is a prerequisite to a §1986 claim. Section 1986 provides that: "every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of same, neglects or refuses to do so, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented." 42 U.S.C. §1986. Thus, in order to state a claim under §1986, Plaintiff must first establish a violation of §1985, and claims which fail to do so must be dismissed. Canney v. City of Chelsea, 925 F. Supp. 58, 68 (D. Mass. 1996).

Because no violation of §1985 has been sufficiently pled, the §1986 claim is not viable, and therefore is subject to dismissal.

VIII. This Court lacks Jurisdiction to expunge Plaintiff's Criminal Record

Plaintiff has set forth no factual or legal bases by which the jurisdiction of this Court could be invoked to grant his request to expunge his criminal record. Campbell does not claim diversity jurisdiction over such a claim, and it appears that avenue is fruitless. See 28 U.S.C. §1332 (granting federal jurisdiction when opposing parties are from different sattes). His request also fails to adequately state an independent factual claim. See 28 U.S.C. §1331. Since the request lacks any basis in federal law, there also appears no basis for this Court to exercise supplementary jurisdiction because there is no underlying federal claim to anchor the state claims. See 28 U.S.C. §1367. moreover, Campbell fails to provide any facts, circumstances or arguments to justify expungement of his criminal record by this Court.

Campbell may have the right to seek expungement of his record with the state court in which he was convicted, see, e.g., M.G.L. c. 276 §100C; Com. v. S.M.F., 40 Mass. App,. Ct. 42, 660 N.E.2d 701 (1996)(comparing court's authority to seal records versus expungement of records), however. since he has filed to provide any factual information with respect to his criminal record, the Court will not address those procedures.

Accordingly, for the reasons stated above, Campbell's request to expunge his record is denied.

IX. State Law Based Claims

To the extent that Campbell asserts any state based claims (which are not clearly set forth in the First Amended Complaint), this Court would decline to exercise supplemental jurisdiction, in light of the deficiencies addressed herein.

CONCLUSION

Based on the foregoing, it is Ordered:

1. Robert J. Campbell's Motion For Leave to Amend the Complaint is granted; the clerk is directed to file the Amended Complaint as the "First Amended Complaint" and is directed to delete and add parties as outlined in Section I of this order;
2. Robert J. Campbell's Application to Proceed Without Prepayment of Fees is denied without prejudice, and Campbell may submit a new application containing a detailed financial statement along with his show cause statement within 35 days of the date of this memorandum and order;
3. This action shall be dismissed unless Plaintiff(s) show good cause within thirty-five (35) days of the date of this Memorandum and Order why the claims should not be dismissed for the reasons stated herein;
4. The Campbell family Investment Trust is dismissed as a Co-Plaintiff in this action, without prejudice, for failure to pay the filing fee and for failure to sign the complaint. The Trustees Application to Proceed Without Prepayment of Fees is denied; and
5. Robert J. Campbell's request to expunge his criminal record is denied.

SO ORDERED.

Dated June 27, 2005

/s/ William G. Young
William G. Young
CHIEF, UNITED STATES
DISTRICT JUDGE

APPENDIX J – MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS ENTERED AUGUST 19, 2005

ROBERT J. CAMPBELL & THE CAMPBELL FAMILY INVESTMENT TRUST, PlaintiffS v. TOWN OF WEYMOUTH, et al., Defendants.

Civil Action No. 05-10620-WGY

YOUNG, C.J.

MEMORANDUM AND ORDER

For the reasons stated herein: (1) Robert J. Campbell's ("Campbell") renewed application to proceed without prepayment of fees is denied; (2) Campbell shall pay the $125.00 apportioned filing fee within thiery-five (35) days; failing which this action shall be dismissed; (3) Campbell may not amend the Second Amended Complaint absent leave of Court upon a showing of good cause for further amendment; (4) If Campbell pays the filing fee, summonses shall issue; (5) The Notice of Appearance file by Attorney Edward P. Clancy (#11) is Stricken, without prejudice; and (6) The Campbell Family Investment Trust ("Trust") shall be dismissed as co-plaintiff in this action unless, within thirty-five (35) days, (a) a Notice of Appearance by duly-licensed counsel representing the Trust is filed which comports with this Order; and (b) the Trust pays the $125.00 apportioned filing fee.

BACKGROUND

On March 14, 2005, Plaintiff Robert J. Campbell ("Campbell") filed a *pro se* Complaint alleging violations of 42 U.S.C. §§1983, 1985, and 1986, claiming that Defendants, zoning board members and affiliates, violate his due process rights and his right to "freedom from represaion," with respect to the issuance of zoning and building permits for a day-care center. Accompanyiny his Complaint was an Application to Proceed Without Prepayment of Fees.

On June 24, 2005, a Memorandum and Order (#9) entered denying Plaintiff's Application to Proceed *in forma pauperis*, without prejudice to renew, upon further submission of detailed financial information. The Order also provided that co-Plaintiff Family Campbell Investment Trust would not be deemed to be a Plaintiff in this action, absent the payment of the filing fee and appearance by counsel. Finally, The Memorandum and Order directed the Plaintiff to show cause why the action should not be dismissed, for the reasons stated therein.

On August 1, 2005, Plaintiff filed a *pro se* response to the June 24th Memorandum and Orer, and a renewed Application to Proceed *in forma pauperis*, with further financial disclosures. Also filed was a Second Amended Complaint (#12) which is signed by Trustee Frances Campbell on behalf of the Trust. That Amended Complaint also deletes the Plaintiff's request to expunge his criminal record, in accordance with this Court's ruling denying his request.

Finally, On Augusst 1, 2005, a Notice of Appearance by Attorney Edward P. Clancy was filed on behalf of the Trust,

. That Amended Complaint also deletes the Plaintiff's request to expunge his criminal record, in accordance with this Court's ruling denying his request.

Finally, On Augusst 1, 2005, a Notice of Appearance by Attorney Edward P. Clancy was filed on behalf of the Trust,

ANALYSIS

I. Campbell's Application to Proceed *In Forma Pauperis*

Campbell's renewed Application to Proceed Without Prepayment of Fees is denied, because jhe has made an insufficient showing that he lacks funds to pay the filing fee. By his own admission, Plaintiff Campbell indicates that he has equity in real and personal property (a house in N. Weymouth, a geo Storm, and a boat with trailer), which totals $115,310.38. he also indicates he is temporarily employed with contracting assignments, earning $728.00 per week ($37,856 per year), and his wife received unemploymeny of $5,880.99 in 2005. he further concedes he received income from gifts, totaling $2700, and has an Equity Line from the Campbell Family Investment Trust, of approximately $450 per month.

Campbell has attempted to underplay his assets by stating that his personal property is damaged and nt operational, that his house is in foreclosure, and that he is unable to refinance due to multiple bankruptcy filings and inconsistent employment. He references several Chapter 13 bankruptcy filings which were dismissed in the past year. Campbell fails to provide information as to whether he ahs any available credit card available.[1]

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[1] The Clerk's Office accepts credit card payments of the filing fee for civil actions, thus making installment payments through credit card

In short, Campbell has not sufficiently demonstrated to this Court that he is without sufficient funds to pay the $125.00 filing fee[2] notwithstanding his credit setbacks in recent history. A litigant who has a net worth in excess of $115,000 and who is earning $728 per week and who has an equit line of credit of $450.00 per month, cannot be deemed to be indigent for purposes of avoiding a filing fee payment. While the denial of *in forma pauperis* status may force Campbell to make some hard choices with respect to prosecution of this litigation, it cannot be said that requiring him to pay a reduced (apportioned) share of the filing fee would force him to choose between foregoing his claims or foregoing the necessities of life. See e.g., Fridman v. The City of New York, 195 F. Supp. At 538. See also, Montiel v. Wyndham Anatole Hotel, 2003 WL 22595820 (N.D. Tex. 2003)(magistrate judge recommending *in forma pauperis* application be denied where plaintiff earned $1,120 per month, spouse earned $2,240 per month, and they had $700 in checking account); Ponder v. Schultz, 2002 WL 31114054 (N.D. Tex. 2003)(magistrate judge recommending *in forma pauperis* application be denied where plaintiff earned $1,600 per month, spouse earned $1,276 in unemployment benefits per month).

Accordingly, Campbell's Application to Proceed *in forma pauperis* is denied. He shall pay the $125.00 filing fee assessed to him within thirty-five (35) days of the date of this Memorandum and Order, or this action shall be dismissed.

II. Issuance of Summonses; Dismissal of State Law Claims

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payments an option for a litigant who cannot easily liquidate other real or personal property.

[2] Notwithstanding that Campbell family Investment trust's appearance as a co-plaintiff is not recognized by this Court at this time, for reasons sated herein, the filing fee is nevertheless apportioned between Robert J. Campbell and the Trust. Campbell's share of the fee is $125.00, as is the Trust's.

In his show cause response (#10), Campbell seeks leave to pursue his land-use and state civil rights claims in the Massachusetts Land Court (Docket #280041). And to pursue his federal claims in this action. Because Campbell has provided a sufficient show cause response to the June 24th memorandum and Order to raise factual issues, this Court will permit summonses to issue for service of process of the Second Amended Complaint (#12) by Campbell, provided he pays the $125.00 fee. If summonses issue, the Court will not authorize free service by the United States Marshal, and Plaintiff must arrange for service of process in accordance with this Court's Local Rules and the Federal Rules of Civil Procedure (see Rules 4 and 5). Additionally, if summonses issue, Campbell is Ordered to serve a copy of the June 24th Memorandum and Order, along with the Second Amended Complaint.

III. No Further Amendments to the Complaint Are Permitted Absent Good Cause Shown

At this juncture, Plaintiff Campbell has sought to Amend his Complaint twice, and this Court has given leave for the First Amended Complaint to be filed. Although Plaintiff ahs sought to file the Second Amended Complaint, given that the Plaintiff has indicated that the Second Amended Complaint attempts to comport with the June 24th Memorandum and Order, the Court will permit the filing of the Second Amended Complaint (#12). However, at some point the Plaintiff must be held to the choices he makes with respect to pleadings in this case, and that time has come. Further, in the interests of judicial economy, the Second Amended Complaint is deemed to be the operative pleading in this action, and this Court will not permit further amendments to the Second Amended Complaint absent a showing by the plaintiff of good cause for any further proposed amendments, and why the proposed changes could not have been included previously.

IV. Attorney Edward P. Clancy's Appearance as Counsel for the Trust is Stricken

In the August 1, 2005 Attorney Edward P. Clancy filed a Notice of Appearance (#11) on behalf of the Trust. First, the Notice of Appearance indicates "Commonwealth of Massachusetts/United States District Court." Second, the Notice states:

> Due to the late date of my retention (July 29, 2005), I have not had an opportunity to adequately review the facts involved in my client's claims, The immediacy of the situation regarding the Court's Memorandum and Order of June 27, 2005, however, compelled me to file an appearance, if only to preserve its standing and/or rights.
>
> I have informed Frances Campbell, trustee for The Campbell Family Investment Trust, that my continued representation will be contingent upon a complete review of the claims.

Notice of Appearance (Docket #11).

Based on this restricted appearance "if only to preserve [the Trust's] standing and.or rights," the Court questions the lack of *bona fide* intention of counsel to represent the Trust in this action, and concomitantly, the *bona fide* intention of the Trust to have counsel appear on its behalf. Additionally, the Appearance seems to indicate counsel's intent not to represent the Trust upon a complete review of the claims. Such statement has Rule 11 implications.

> Rule 11 of the Federal Rule of Civil procedure provides, in pertinent part:
>
> (b) Representations to the Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the peson's knowledge, information and belief, formed after an inquiry under the circumstances,--

A.(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary dlay or needless increase in the cost of litigation;
(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or nelief.
(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines the subdivision (b) has been violated, the court may, subject to conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation,

Fed. R. Civ. P. 11

Moreover, Attorney Clancy's statements indicate a unilateral decision oto withdraw representation if he so wishes, after a further review of the claims. The Court notes that such practice is not sanctioned by this Court's Local Rules. Local Rule 83.5.2(c) provides:

(c) Withdrawal of Appearance. An attorney may withdraw from a case by serving notice of his withdrawal on his client and all other parties and filing the notice, provided that (1) such notice is preceded or accompanied by notice of appearance of other counsel; (2) there are no motions pending before the court; (3) no trial date has been set; and (4) no hearings or conferences are scheduled, and no reports, oral or written, are due. Unless these conditions are met, an attorney (including one

whose services have been terminated by his client) may withdraw from a case only by leave of court.

Id. In view of the above, the Court will not permit this Notice of Appearance merely as a way of "buying time" for the Trust.

Accordingly, the Notice of Appearance by Attorney Clancy shallbe Stricken. This is without prejudice to re-filing a Notice of Appearance within thirty-five (35) days of the date of this Memorandum and Order, by Attorney Clancy, or any other counsel wishing to enter an Appearance on behalf of the Trust. Such Notice of Appearance shall also state the following:

1. Counsel has reviewed the Second Amended Complaint and has a good faith basis to assert the claims stated therein on behalf of the Trust; and
2. Counsel is filing the Notice of Appearance with a good faith intention to continue representation of the Trust throughout the course of the litigation.

Finally, as more fully discussed in the June 24th memorandum and Order, the Trust must be represented by counsel, and cannot appear *pro se*. Because at this time the Court does not recognize that the Trust is represented by counsel, it is hereby Ordered that the Trust shall be dismissed from this action within thirty-five (350 days of the date of this Memorandum and Order, unless a Notice of Appearance by a duly licensed attorney is filed, comporting with the parameters outlined above.

V. Failure of the Trust to Pay the Filing Fee

Although it appears attempts have been made to comply with the June 24th memorandum and Order, the docket does not reflect that the Trust has paid the filing fee for civil actions. As noted in the prior memorandum and Order, the Trust is not an entity entitled to in forma pauperis status, and therefore must pay the filing fee. However, since it is the

practice of this Court to apportion the filing fee amongst the Plaintiffs, the Trust's share is deemed to be $125.00.

Accordingly, it is Ordered that the Trust shall pay the $125.00 filing fee within thirty-five (35) days; failing which, the Trust shall be dismissed from this action.

CONCLUSION

In view of the foregoing, it is hereby ORDERED:

1. Campbell's renewed Application to proceed without prepayment of fees (#13) is denied;
2. Campbell shall pay the $125.00 apportioned filing fee within thirty-five (35) days; failing which this action shall be dismissed;
3. Campbell may not amend the Second Amended Complaint absent leave of Court upon a showing of good cause for further amendment;
4. If Campbell pays the filing fee, summonses shall issue. The Court will not authorize free service of process by the United States Marshal.
5. The Notice of Appearance filed by Attorney Edward P. Clancy (#11) is Stricken, without prejudice;
6. The Campbell Family Investment Trust shall be dismissed as a co-plaintiff in this actionunless, within thirty-five (35) days, (a) a Notice of Appearance by duly-licensed counsel representing the Trust is filed which comports with this Order; and (b) the Trust pays the $125.00 apportioned filing fee.

SO ORDERED.

Dated August 19, 2005

/s/ William G. Young
William G. Young
CHIEF, UNITED STATES
DISTRICT JUDGE

APPENDIX K – MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS ENTERED OCTOBER 14, 2005

ROBERT J. CAMPBELL & THE CAMPBELL FAMILY INVESTMENT TRUST, PlaintiffS v. TOWN OF WEYMOUTH, et al., Defendants.

Civil Action No. 05-10620-WGY

YOUNG, C.J.

FURTHER MEMORANDUM AND ORDER

On June 24th, 2005, a Memorandum and Order (#9) entered directing that the co-Plaintiff Family Campbell Investment Trust ("the Trust") would not be deemed to be a Plaintiff in this action, absent the payment of the filing fee and appearance by counsel on behalf of the Trust.

On August 1, 2005, a Notice of Appearance by Attorney Edward P. Clancy was filed on behalf of the Trust. On August 19th, 2005 this Court issued aa further Memorandum and Order (#14) striking Attorney Clancy's Notice of Appearance, and directing that a Notice of Appearance be re-filed by Attorney Clancy, or any other counsel wishing to enter an Appearance on behalf of the Trust, within thirty-five days. The Memorandum and Order further provided that the Court would not recognize the Trust as a party unless it was represented by counsel, and Ordered that the Trust be dismissed from this action within thirty-five (35) days, unless a Notice of Appearance by a duly licensed attorney was filed, comporting with the parameters outlined the August 19th, 2005 Memorandum and Order.

To date, the $250.00 iling fee was paid, however, no appearance of counsel has been filed, and the time period for doing so has lapsed.

Accordingly, for failure of the Trust to comply with the directives contained in the August 19th, 2005 Memorandum and Order, it is hereby ORDERED that th Campbell family Investment Trust is dismissed as a party to this action, without prejudice, If the Campbell family Investment Trust seeks to litigate the claims presented in this action, it must file a new Complaint and pay the $250.00 filing fee for filing civil actions, and it must be represented by duly licensed counsel appearing on behalf of the Trust.

SO ORDERED.

Dated October 14, 2005

/s/ William G. Young
William G. Young
CHIEF, UNITED STATES
DISTRICT JUDGE